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ABSTRACT

This document is a transcript of a Congressional oversight hearing on the Department of Education's enforcement of Federal Civil Rights laws. Testimony, letters, and prepared statements are included from representatives of the department's Office for Civil Rights (OCR), the National Association for the Advancement of Colored People, the National Women's Law Center, and the Disability Rights Educational and Defense Fund. According to a final statement by the committee chairman, major findings of the hearing were: (1) although the OCR seeks voluntary settlements of all discrimination complaints before the investigation begins, many cases are apparently not settled on a sound legal basis; (2) the OCR has moved to a good-faith standard in measuring the effectiveness of desegregation plans; (3) the Justice Department has taken little action on the nearly two dozen discrimination cases referred to it by OCR since 1981; (4) despite serious staff shortages at OCR, the office routinely returns funds it had been allocated for law enforcement activities; and (5) discrimination in the United States continues to be a problem. (KH)

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INVESTIGATION OF CIVIL RIGHTS ENFORCEMENT BY THE DEPARTMENT OF EDUCATION

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE

COMMITTEE ON

GOVERNMENT OPERATIONS

HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

FIRST SESSION

JULY 18 AND SEPTEMBER 11, 1985

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INVESTIGATION OF CIVIL RIGHTS ENFORCEMENT BY THE DEPARTMENT OF EDUCATION

THURSDAY, JULY 18, 1985

House of Representatives,
Intergovernmental Relations
and Human Resources Subcommittee
of the Committee on Government Operations,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 2154, Rayburn House Office Building, Hon. Ted Weiss (chairman of the subcommittee) presiding.

Present: Representatives Ted Weiss, John Conyers, Jr., Robert S. Walker, and Richard K. Armey.

Also present: James R. Gottlieb, staff director; Marc Smolonsky, professional staff member; Pamela H. Welch, clerk; and Martha Morrison, minority professional staff, Committee on Government Operations.

OPENING STATEMENT OF CHAIRMAN WEISS

Mr. Weiss. Good morning.

This hearing will come to order. I know my colleagues have comments. We will proceed in any event. I am sure they will be here shortly.

Today, we will conduct an oversight hearing on the Department's enforcement of Federal civil rights laws.

Four major laws have been enacted by Congress to preserve the precious constitutional right of equal educational opportunity.

They are the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975.

They explicitly prohibit discrimination on the basis of race, sex, handicap, or age by any school system or institution that receives Federal funds. The Office for Civil Rights in the Department of Education is responsible for enforcing these laws.

This is not a hearing intended to debate civil rights philosophy. This is a hearing about law enforcement. The laws passed by Congress, and the judicial interpretations of those laws are clear in regard to educational discrimination. It is illegal.

The Department of Education is required by law and major court orders to investigate allegations of discrimination in educational institutions and systems.

The Department is further required by law to conduct independent compliance reviews of school systems where discrimination is evident, even if the Department has not received a specific complaint.

Wherever and whenever discrimination is found to constitute a violation of the Federal civil rights statutes, the Department of Education is bound to enforce the law.

The Office for Civil Rights has several enforcement methods available. It can negotiate a voluntary settlement. It can pursue enforcement through a hearing before an administrative law judge. It can refer cases to the Department of Justice.

Regardless of the enforcement tool used, the Department of Education must ensure that the discrimination found is remedied.

The purpose of today's hearing is to review the disposition of investigations conducted by the Office for Civil Rights and to ensure that when a violation of law is found, the Department of Education uses the most effective methods at its disposal to stamp out illegal discrimination.

Unfortunately, the subcommittee's attempts to review the Departments' enforcement performance have been hindered to date by the Office for Civil Rights' withholding of key documents.

The restriction of access to the numerous documents requested by the subcommittee is improper, and I intend to resolve this access problem today.

The subcommittee has invited Julius Chambers, the distinguished president of the NAACP Legal Defense Fund, and Phyllis McClure of the LDF Washington office to testify.

Also here to testify are Michael Landwehr of the Disability Rights, Education and Defense Fund, and Marcia Greenberger of the National Women's Law Center.

We will also hear from Harry Singleton, the Assistant Secretary for Civil Rights at the Department of Education, and Antonio Califa, former Director of the Office for Civil Rights' Policy and Enforcement Service.

Before I call the first panel of witnesses up, let me indicate that we are joined by our distinguished colleague from Texas, Mr. Armey.

Mr. Armey, if you have an opening comment to make, we would be pleased to hear it.

Mr. ARMEY. No, Mr. Chairman.

Mr. WEISS. Thank you.

If Mr. Chambers, Ms. McClure, Mr. Landwehr, and Ms. Greenberger would take their positions at the witness table, I think we are ready to proceed.

The panel is also joined by Elliott Lichtman, who is a counsel in the *Adams* case.

I understand that Ms. Greenberger has not yet arrived, but she should be here shortly.

Before we proceed, the tradition and practice of the subcommittees of the Government Operations Committee is to have witnesses swear or attest or affirm what their testimony is going to be, so if you would all raise your right hand.

[Witnesses sworn.]

Mr. WEISS. Mr. Chambers, I think we will begin with you.

STATEMENT OF JULIUS CHAMBERS, DIRECTOR-COUNSEL, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ACCOMPANIED BY PHYLLIS McCLURE, WASHINGTON OFFICE, AND ELLIOTT LICHTMAN, COUNSEL

Mr. CHAMBERS. Chairman Weiss and members of the subcommittee, I thank you for the opportunity to give testimony at the oversight hearings today on the Office for Civil Rights in the Department of Education.

My name is Julius Chambers, and I am director-counsel of the NAACP Legal Defense and Educational Fund.

These hearings are crucially important to the continual struggle to assure equal educational opportunity for minorities, women, and the disabled.

They are essential to revitalize OCR's enforcement of Federal statutes that bar discrimination by education recipients of Federal financial assistance.

I ask that my written testimony be entered into the record.

Mr. WEISS. Without objection your prepared testimony will be entered into the record. You may summarize it or present it in any way that you please.

Mr. CHAMBERS. Thank you.

Let me begin by underlining the importance of the administrative enforcement process required by title VI, title IX, and section 504.

It is both fair and cost-effective. Standards are applied uniformly and consistently, both victims of alleged discrimination and recipients of Federal funds can expect even-handed treatment.

Individuals may seek redress in the courts, but litigation is burdensome and expensive for students, for schools, for colleges, and for the Federal court.

Moreover, individual lawsuits often do not address systemic patterns of discrimination or promote systemwide or institutionwide remedies.

Litigation places the burden on the victim rather than the Federal Government for enforcing the Nation's guarantee of nondiscrimination by recipients of Federal funds.

Finally, administrative, as opposed to judicial, enforcement is far more effective. The threat of losing Federal money is a greater stimulus to corrective action than court-ordered relief.

Fund termination occurs only after a lengthy process. The history of title VI proves that the actual use of the sanction can produce compliance where voluntary corrective action does not work.

For example, 892 recipients were in some phase of the administrative enforcement process between 1966 and 1978, but only 219 actually had funds terminated.

All but two of those 219 recipients ultimately came into compliance and had their funds restored.

The focus of this committee's oversight hearings is the Office for Civil Rights' performance in carrying out enforcement of title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, and section 504 of the Rehabilitation Act of 1973.

Speaking for the NAACP Legal Defense Fund, I can say that the Office for Civil Rights has enforced these laws and vindicated people's rights only under pressure from the courts and from advocacy organizations—not just the Legal Defense Fund, but the Disability Rights Education and Defense Fund, the National Women's Law Center, and countless other groups around the country, as well as here in Washington.

The fact is that the rights of minorities and victims of discrimination are rarely popular with the majority. Only when we have three branches of the Government acting in concert to enforce minority rights have minorities, women, and the disabled made progress in securing equal educational opportunity.

For black citizens there was one brief moment in this century when our rights to full and equal citizenship took a moment, a leap forward.

The Supreme Court had declared separate and unequal schools unconstitutional. Congress enacted the Civil Rights Act of 1964, including title VI, and the President supported an Executive enforcement of the 1964 act.

Now, civil rights enforcement is under attack by the executive branch of Government. That is why the Legal Defense Fund especially welcomes this committee's attention to this issue. The taxes collected from all of us must not be used to subsidize discrimination against some of us.

How has the Office for Civil Rights of the Department of Education defaulted on its responsibility to enforce the nondiscrimination statutes within its jurisdiction?

First, when OCR takes months, even years, to complete an investigation and issue a letter of finding, justice is denied.

When OCR takes months, even years, to negotiate a settlement, justice is denied. When OCR takes months, even years, to initiate enforcement, justice is denied.

It is fundamental to our political system that aggrieved citizens be able to petition their Government for redress of grievances. When the Government fails to act, to answer their complaint, to investigate, to take enforcement action upon the finding of a violation, justice is denied.

One of my primary concerns is that blacks obtain the educational tools to get a job, to compete in the job market, and to earn money necessary to support their families.

Whether in elementary, secondary, or higher education, black citizens are today still receiving second-rate education.

And, as my written testimony demonstrates, blacks are often penalized for the failure of States to undo the long history of educational neglect.

Today, as we see figures of the decreasing enrollment of minorities in higher education, in undergraduate schools, and graduate schools, and professional schools, we are all concerned about OCR's enforcement of title VI and title IX in higher education.

As we see today the failure of minority students in elementary and secondary schools, OCR's enforcement of title VI and title IX becomes crucially important.

Second, incompetency and mismanagement by OCR may not be unconstitutional, but they certainly affect the rights of minorities, of women, and of the handicapped.

The money and effort expended on misguided data collection and agency initiated compliance reviews, of gross misuse of precious resources, I submit that OCR's 1984 school survey and the random selection of compliance review sites are gross misuse of civil rights compliance dollars.

Your committee, Congressman Weiss, ought to demand that OCR do better.

Third, the Office for Civil Rights settlements for civil rights violators are often much ado about nothing. Enormous resources are spent on factual investigations, which support findings of illegal conduct by recipients of Federal funds only to give way to a store with paper plans and promises for future compliance and future monitoring of compliance.

Professionals committed to civil rights for minorities, for women, and the disabled are leaving the Office for Civil Rights in droves. They see no future for fulfilling their commitment as civil servants to law enforcement.

Unless this committee and this Congress demand aggressive and efficient civil rights enforcement, I fear that we are in another twilight of second-class citizenship.

I have kept my testimony brief so that the committee may raise what questions it would like to pursue. I would like to conclude by again expressing my gratitude to you, Congressman Weiss, and to the committee for having devoted your attention to this issue today, and giving us an opportunity to participate in these hearings.

Mr. Weiss. Thank you very much, Mr. Chambers.

[The prepared statement of Mr. Chambers follows:]

Testimony of

Julius Chambers
Director-Counsel

NAACP Legal Defense and Educational Fund, Inc.

before the

Subcommittee on Intergovernmental Relations
and Human Resources

of the

House Committee on Government Operations

July 18, 1985
Washington, D.C.

Chairman Weiss and Members of the Subcommittee, thank you for this opportunity to give testimony at the oversight hearings on the Office for Civil Rights (OCR) in the Department of Education. My name is Julius Chambers, Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc.

These hearings are crucially important to the continuing struggle to assure equal educational opportunity for minorities, women, and the disabled. They are essential to revitalize OCR's enforcement of federal statutes that bar discrimination by education recipients of federal financial assistance.

I. INTRODUCTION

There is no better point of departure for these hearings than the words of Chief Justice Earl Warren for a unanimous Supreme Court which struck down state mandated racial segregation in schools:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training and in helping him adjust normally to his environment. It is doubtful that any child may reasonably be expected to succeed

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> in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.
>
> To separate . . . [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in ways unlikely to be undone.... *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

The NAACP Legal Defense Fund has argued before the Supreme Court virtually every major school desegregation case since *Brown*: *Cooper* v. *Aaron*, 358 U.S. 1 (1958); *Goss* v. *Board of Education*, 373 U.S. 683 (1963); *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964); *Green* v. *New Kent County*, 391 U.S. 430 (1968); *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Keyes* v. *School District #1*, 413 U.S. 189 (1973).

A. The NAACP Legal Defense Fund's Long Involvement with Title VI and the Office for Civil Rights

Title VI of the Civil Rights Act of 1964 was enacted to enforce the 14th Amendment to the Constitution and *Brown* v. *Board of Education*. That statute empowers the Department of Education to terminate federal funds from recipients that discriminate on the basis of race, color or national origin, including *de jure* segregated school systems. From the very beginning of Title VI, the NAACP Legal Defense Fund has devoted significant resources to ensuring administrative enforcement of the law.

The Legal Defense Fund and the American Friends Service Committee established a joint task force on school desegregation in the 1965-1966 school year. Teams of civil rights workers fanned out across the South to inform black parents of their childrens' right under Title VI to attend a formerly all-white school and to assist the brave children and their stalwart mothers and fathers in transferring to schools in hostile and sometimes violent circumstances.

The Legal Defense Fund reviewed HEW-approved desegregation plans and filed administrative complaints when those plans were defective. We have pressed OCR to establish and publish uniform criteria for acceptable desegregation plans for elementary and secondary school districts and state systems of public higher education, as well as non-discrimination in vocational education. We have scrutinized the implementation of school desegregation plans and joined with other organizations to report our findings.*

When the Committee on Government Operations was considering legislation to create a cabinet-level Department of Education, the Legal Defense Fund successfully persuaded both the Committee and ultimately the Congress to adopt statutory provisions to assure the integrity and high-level responsibility of the

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*Alabama Council on Human Relations, American Friends Service Committee, Delta Ministry of the National Council of Churches, NAACP Legal Defense and Educational Fund, Inc., Southern Regional Council, Washington Research Project, *It's Not Over in the South: School Desegregation in Forty-Three Southern Cities Eighteen Years After Brown* (May 1972).

department's civil rights law enforcement function. Department of Education Organization Act, P.L. 96-88, Section 203 (1979).

Finally, when HEW and the Nixon Administration abandoned Title VI and declared its hostility to school desegregation, the Legal Defense Fund filed suit in 1970 to compel enforcement of the statute in the 17 Southern and Border States. *Adams* v. *Richardson*, now *Adams* v. *Bennett* and its companion case, *WEAL* v. *Bennett*, have a long and complicated procedural history. Although it started as a Title VI enforcement case, *Adams* now embraces Title IX of the Education Amendments of 1972 (sex discrimination) and Section 504 of the Rehabilitation Act of 1973 (handicapped discrimination).

In the face of the failure of the federal government to heed the requirements of these three statutes, plaintiffs have, over 15 years, sought and obtained major relief to revive OCR's administrative enforcement effort. Now the Reagan Administration is asking the United States District Court for the District of Columbia to dismiss *Adams* and *WEAL*, arguing in part that plaintiffs do not even have standing to challenge defendants' abdication of their civil rights enforcement responsibility.

B. The Importance of the Administrative Enforcement Process

I will return to the procedural and substantive history of *Adams* in a moment, but before I do, I want to underline the importance of the administrative enforcement process required by Title VI, Title IX and Section 504. It is both fair and cost-effective. Standards are applied uniformly and consistently; both victims of alleged discrimination and recipients of federal funds can expect even-handed treatment. Individuals may seek redress in the courts, but litigation is burdensome and expensive for students, schools, colleges and for the federal courts.

Moreover, individual lawsuits often do not address systemic patterns of discrimination or promote system-wide or institution-wide remedies. Litigation places the burden on the victims rather than the federal government for enforcing the nation's guarantee of nondiscrimination by recipients of federal funds.

Finally, administrative, as opposed to judicial, enforcement is far more effective. The threat of losing federal money is a greater stimulus to corrective action than court-ordered relief. Fund termination occurs only after a lengthy process. The history of Title VI proves that the actual use of the sanction can produce compliance where voluntary corrective action does not work.

For example, 892 recipients were in some phase of the administrative enforcement process between 1966 and 1978, but only 219 actually had funds terminated. All but two of those 219 recipients ultimately came into compliance and had their funds restored.

There has been bipartisan anathema to employing even the threat of fund termination by initiating the administrative enforcement process when voluntary negotiations fail. But it is only the willingness to use the stick of Title VI that makes the carrot--voluntary compliance--effective.

In the early years (1964-1968) of Title VI, the real potential of losing federal money was enough to desegregate thousands of Southern schools. After the first Adams order in 1973, OCR began initiating administrative actions against Southern districts whose desegregation plans did not pass constitutional muster. After the 1983 Adams order set deadlines for securing compliance in pending cases, OCR took 23 cases to administrative law judges and referred 18 cases to the Department of Justice. That order generated more enforcement proceedings than had occured in all of the previous decade.

II. THE PROCEDURAL HISTORY OF ADAMS v. BENNETT

This section of my testimony summarizes the issues and procedural history of the Adams litigation. I hope to give the Subcommittee a context by which it can assess the current enforcement issues and problems facing the Office for Civil Rights.

The first part explains the events that led to the filing of the lawsuit. The second part describes what is now known as the time frames for processing complaints and compliance reviews. The third part deals with desegregation of formerly de jure state systems of public higher education. Part four outlines the successful effort to enforce Title VI in vocational and special purpose schools.

A. The Background of Adams

In 1969, five years after passage of Title VI, federal funds were still flowing to obviously segregated schools in the South. Although OCR had terminated funds in 46 instances, its standards were unduly lax and permissive with respect to both the time and substance of desegregation plans.

OCR had sent letters to 10 Southern and Border states finding that the states had failed to eliminate the vestiges of racial segregation in higher education systems. Five states chose simply to ignore OCR's letter. Five states submitted plans, but OCR took no action. In short, even among those states which OCR had found in violation of Title VI, none had been required to implement "at once" a desegregation plan. Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969)

OCR had obtained Title VI assurances of compliance from state departments of education but had wholly failed to require those departments to dismantle the racially separate vocational schools and schools for the deaf, blind and other handicapped children.

Finally, on July 3, 1969, HEW Secretary Robert H. Finch and Attorney General John H. Mitchell, jointly announced a new policy "to minimize the number of cases in which it becomes necessary to employ the particular remedy of a cutoff of federal funds." This policy statement also revoked the previous Title VI deadlines for complete desegregation by the opening of the 1968-1969 or, at the latest, 1969-1970 school year. The July 3rd statement presaged virtually complete abandonment of fund termination--the teeth of Title VI. It therefore sanctioned the entrenched practice of public school segregation.

B. The Time Frames Order

From the earliest phases of the Adams litigation, delay and inaction in processing cases have characterized OCR's conduct, and time frames have been an essential part of the remedy ordered by the court. In pending cases where the agency had established a Title VI violation, OCR sought voluntary compliance through negotiation and conciliation not for months, but for years.

In the seminal 1973 order the court required OCR to start enforcement proceedings in over 100 noncomplying school districts within 60 days. 356 F.Supp. 95, 97. The order also addressed the disposition of future cases by requiring OCR to report twice a year on all instances of failure to observe timeframes in processing complaints of discrimination filed by black citizens. The 1973 Adams order was affirmed, en banc, by the Court of Appeals for the District of Columbia, 480 F.2d 1159 (1973).

After the 1973 rulings, Legal Defense Fund monitoring of OCR revealed the continuing practice of extensive delays at both the investigation and negotiation phases of Title VI enforcement. We returned to court seeking further relief, and in 1975 the district court found a repetition of the "over-reliance by HEW on the use of voluntary negotiations over protracted time periods." 391 F.Supp. 269, 271. The 1975 supplemental order again directed the commencement of enforcement proceedings within specified time periods.

Like the 1973 order, the 1975 order granted prospective relief because "HEW has often delayed too long in ascertaining whether a complaint or other information of racial discrimination constitutes a violation of Title VI." 391 F.Supp. 273. Accordingly, the court set out basic time frames for processing all complaints and compliance reviews.

1. A Letter of Findings (LOF) determining whether the recipient is in compliance with Title VI was to be issued within 90 days after receipt of a complaint or start of a compliance review.
2. If a violation is found, corrective action was to be secured within an additional 90 days.
3. If voluntary compliance could not be secured, enforcement proceedings were to be initiated within an additional 30 days.

The time frames were incorporated in a new 1976 order following a settlement agreement among the parties. That settlement followed OCR's plea of inadequate resources to comply simultaneously with the 1975 order and its other statutory responsibilities.

By this time (1976-1977) three corollary developments had affected OCR enforcement responsibilities. In response to the agency's failure to enforce Title IX, the Women's Equity Action League (WEAL) had filed suit in 1974. This action was combined with Adams and national origin plaintiffs were permitted intervention. 536 F.2d 417 (1976). The National Federation of the Blind was permitted to intervene to raise the issue of Section 504 nonenforcement by order of the district court on October 7, 1977.

In Brown v. Weinberger, 417 F.Supp. 1215 (D.D.C. 1976), a parallel case concerning OCR's non-enforcement of Title VI in the northern and western parts of the country, the court found unconscionable and unjustifiable delays in the processing of numerous cases pending during the same period for which the Adams court reached a similar conclusion for the Southern and Border states. As the Brown court concluded with respect to investigations pending at OCR,

> The substantial delays of from one and one-half to eight years without bringing these investigations to conclusions, during which time the school districts involved have continued to receive Federal financial assistance, violate the agency's own regulations and the express intent of Congress in Title VI. (id. at 1220)

Similarly, with respect to districts found by OCR to have violated Title VI, the Brown court added:

> In the twenty-six school districts here, compliance negotiations have been going on for periods of time ranging from nine months to three years without success. This being the case, the Court is of the opinion that the limited discretion of the defendants has ended and that HEW must commence to enforce the mandate of Title VI. (id. at 1222)

The Brown court then ordered in these cases time deadlines for the completion of investigations and the commencement of enforcement proceedings, from which the government filed no appeal.

Within a year of the 1976 order it had become clear that the agency was defaulting on the order in major respects. OCR had permitted the accumulation of a backlog of hundreds of unresolved complaints, and there were wide-ranging violations of the time frame requirements. Accordingly, when plaintiffs and intervenors again sought supplementary relief in 1977, OCR officials conceded their violations of the 1976 order but rejoined that OCR was unable "given currently-available resources and those which can reasonably be expected to be made available to OCR in the foreseeable future, to comply with all aspects of this Court's existing order and simultaneously meet its other ongoing civil rights enforcement responsibilities."

The district court urged the parties to negotiate their differences, and as a result of those negotiations entered a consent decree on December 29, 1977. This carefully crafted agreement gave OCR time to process a huge backlog of cases and to hire and train additional staff. The basic 90-90-30 day time frames were retained and would apply to the agency's compliance activities throughout the nation with respect to discrimination based on race, national origin, sex and handicap.

OCR's initial efforts to comply with the 1977 consent decree met with considerable success. The backlog was virtually eliminated, despite the heavy flow of new complaints and the simultaneous conduct of more than 600 compliance reviews.

The progress did not last. By 1980 OCR regressed again to massive delays. Eighty-eight percent (88%) of the 225 compliance reviews were behind schedule. With respect to complaint processing during the period October 1980 to April 1981, the Letter of Finding was not issued on time for more than 60% of the complaints. And there remained in 1981 170 very old complaints, some of which had been pending as long as nine years.

Based on such evidence, plaintiffs and intervenors returned to court for further relief. The government sought to

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vacate the Adams/WEAL order altogether. The court rejected the government's motion and issued an order on March 11, 1983 incorporating the salient provisions of the 1977 order, with appropriate modifications to render it more effective. As the court found, if OCR is "left to its own devices, the manpower that would normally be devoted to this type of thing, . . . might be shunted off into other directions, will fade away and the substance of compliance will eventually go out the window."

The government appealed the March 11, 1983 order, and on September 14, 1984 the court of appeals remanded the case to the district court for consideration of plaintiffs' standing.

C. Higher Education Desegregation Orders

The 1973 order, affirmed by the court of appeals, supra p. 8 , directed that OCR obtain plans from states that had formerly operated de jure systems of public higher education, which would disestablish the separate and unequal system of post-secondary education and enhance the historically black colleges. The court of appeals stressed that state-wide measures must be required to eliminate state-wide vestiges of segregation in state systems of higher education.

The plans rubber-stamped by OCR, as the court put it at the January 1977 hearing, proved to be mere "pieces of paper," lacking any concrete promise of desegregation. Therefore, the court ordered OCR to require the states to submit new desegregation plans. 480 F.Supp. 118, 121.

Because the 1974 plans contained widely different standards, the court ordered OCR to publish criteria setting forth in clear terms the general desegregation requirements that would constitute the conditions for the acceptance of new plans from the states. The criteria were initially published in 1977 and slightly revised in February 1978.* Inherent in them was a requirement that specific commitments be made by the states in the areas of (1) admission, (2) recruiting and retention of students, (3) the placement and duplication of program offerings among institutions, (4) the role and enhancement of black institutions, and (5) the changes in the racial composition of faculties.

The criteria directed "not only that each institution pursue nondiscriminatory student admission and faculty and staff employment practices, but also that the state system as a whole develop a comprehensive and coordinated statewide desegregation plan embodying those specific affirmative, remedial steps which will prove effective in achieving significant progress toward the disestablishment of the structure of the dual system and which address the problem of 'systemwide racial imbalance.'"

The criteria further set forth numerical goals and timetables by which to measure progress toward elimination of the effects of the unconstitutional, _de jore_ racial segregation.

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*Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education, Federal Register, Vol. 42, No. 32, p. 6658-6664 (February 15, 1978)

The court directed that each state be required to submit a new or revised plan within 60 days and OCR accept or reject those plans within 120 days. Plans from Arkansas, Florida, Oklahoma, and North Carolina Community Colleges were accepted in 1978 and from Georgia and Virginia in 1979.

The North Carolina four-year university system refused to submit an acceptable plan and was referred for administrative enforcement. During the time that the North Carolina matter was being tried before an administrative law judge, Secretary of Education Terrel Bell accepted a plan from North Carolina in 1982 that in several substantial respects violated the criteria.

Returning to the 1970-1979 period, OCR began investigations of seven other states which had operated de jure segregated systems of higher education prior to 1954. These states are: Alabama, Delaware, Kentucky, Missouri, Ohio, South Carolina, Texas, and West Virginia. But OCR had been so dilatory in completing the investigations and issuing LOF's that plaintiffs returned to court. As a result the court approved a consent order in December 1980 which set a deadline of January 15, 1981 for issuance of all remaining LOF's.

In 1982, the Legal Defense Fund determined that, as to the first group of states, there had been more default on the criteria's requirements and on their five-year commitments than there had been achievement of what had been promised. And as to the second group of states (those receiving LOF's in 1981), Title VI enforcement was essentially at a standstill.

Negotiations with these states had been dragging on with no desegregation plans accepted by OCR, and yet no enforcement proceedings had been commenced. In three other states, OCR had accepted less than state-wide desegregation plans, in violation of the court of appeals' mandate that there be state-wide desegregation of higher education which for nearly a century was segregated state-wide.

A motion for further relief was filed in December 1982 which led to the March 24, 1983 Order. That order found as to the first group of states:

> each . . . has defaulted in major respects on its plan commitments and on the desegregation requirements of the Criteria and Title VI. Each state has not achieved the principal objectives in its plan because of the state's failure to implement concrete and specific measures adequate to ensure that the promised desegregation goals would be achieved by the end of the five year desegregation period.

With respect to Arkansas, Georgia, Oklahoma, Florida, and the North Carolina Community Colleges, OCR was ordered to require a plan from each state by June 30, 1983 which would reasonably ensure that all goals of their 1978 plan were met no later than the fall of 1985, or to commence enforcement proceedings no later than September 15, 1983. Other relief was order for Virginia.

As to the second group of states--Pennsylvania, Texas and Kentucky--OCR was ordered to obtein plans which "fully conform to the Criteria and Title VI." With respect to the three other states in the second group--West Virginia, Missouri and Delaware--the court found that there had been no showing of "system-wide imbalance" and that the plans accepted from those states compiled with Title VI.

Resolution of the compliance status of these various states awaits OCR's evaluation of their progress in achieving full compliance by the requisite dates pertinent to each plan and the Legal Defense Fund's evaluation of the states' plans. We are now engaged in that work.

D. Vocational and Special Purpose Schools

Shortly after the filing of *Adams*, OCR announced its intention to lauch a compliance program with respect to state-administered schools, but it took no such steps until ordered to do so by the district court two and a half years later.

In the course of the litigation, OCR submitted information about 205 vocational schools, 28 schools for the blind and deaf, and certain other schools for the mentally handicapped administered by state education agencies in the 17 Southern and Border States. OCR had no enrollment or faculty data by race for these schools, with the exception of 32 vocational schools in Louisiana, seven of which were overwhelmingly black and 25 of which were overwhelmingly white.

In its decision of February 1973, the court noted these Louisiana statistics and concluded: "Many of the schools operated by state departments of education are obviously segregated." The district court ordered OCR "to implement without unreasonable delay an enforcement program adequate to secure Title VI compliance with respect to vocational and other schools administered or operated by State Departments of Education sufficient to assure their compliance with Title VI, including reporting and on-site reviews."

Among the segregated schools that still existed nine years after passage of Title VI were: the Louisiana State School for the Deaf, the Louisiana State School for Deaf Negroes, the Louisiana State School for the Blind, the Louisiana State School for Blind Negroes. Although these institutions were in presumptive non-compliance, it took the plaintiffs' motion for further relief and the 1977 consent order to get OCR to move.

The 1977 consent order required OCR to:

1. conduct compliance reviews in previously identified segregated special purpose and vocational schools;
2. conduct statistical surveys of the special purpose and vocational schools which had never been included in OCR's normal data collection of enrollment in elementary, secondary and post-secondary institutions;
3. develop and publish compliance standards for vocational education schools.

By 1979 OCR had essentially complied with this part of the Adams order.

III. CURRENT COMPLIANCE PROBLEMS

A. Performance on Adams Time Frames

The normal Adams time frames for complaints provide (1) 15 days for acknowledgment, (2) 90 days for investigation and issuance of the LOF, (3) 90 days to secure corrective action, and (4) failing voluntary compliance, 30 additional days to take formal enforcement action. Compliance reviews have the same deadlines except that there is no acknowledgment stage.

For more complex cases, OCR may "except" up to 20% of all complaints and 20% of all reviews and take up to 120 more days. These cases fit within the exceptional time frames.

Provided here are the highlights of our recent analysis of OCR's compliance with the time frames for processing complaints and compliance reviews initiated in Fiscal Year 1983 and Fiscal Year 1984.

1. Nationwide for all complaints, OCR failed to issue the LOF on time in 24% of the cases in FY 1983 and 18% of the cases in FY 1984.
2. Looking just at the complaints in the exceptional category where OCR has 120 days longer, 33% of the LOFs were issued late in FY 1983 and 11% were late in FY 1984.
3. The nationwide averages mask large variations in meeting time frames among regional offices. For example, in FY 1983 for both normal and exceptional complaints, Region VIII (Denver) issued 83 LOFs, 91% of them on schedule, but Region X (Seattle) issued 40 LOFs, 58% of them on time. In FY 1984 Region II (New York) issued only 60% of 104 LOFs due on time. Region V (Chicago) issued 95% of 220 LOF's within the time frames.
4. Only slightly more than half of all compliance review LOF's were issued timely: 52% in FY 1983 and 54% in FY 1984.

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5. Large disparities among regional offices in meeting LOF time frames also occurred for compliance reviews. In FY 83, Region III (Philadelphia) with 36 LOF due dates met only 11% on time, while Region IX (San Francisco) with 46 LOF due dates met 85% on time. In FY 84, Region X (Seattle) with 6 LOF due dates, met only 17% on time, but Region VII (Kansas City) with 29 LOF due dates met 90% on time.

B. Dillon County School District #2, South Carolina

One of the more egregious examples of OCR's malfeasance in recent years is the Assistant Secretary for Civil Rights' refusal to take enforcement action against Dillon County School District #2, despite having found the district in violation of Title VI on three different occasions beginning as long ago as 1977.

The elementary and secondary schools of Dillon County School District #2 historically operated under de jure segregation. On the basis of a May 1977 compliance review, on December 27, 1977, OCR issued a Letter of Findings which determined that Dillon County School District #2 "is not in compliance with Title VI" because of the district's ability grouping practices. OCR concluded that:

> The district has assigned students to regular classes in a discriminatory manner which has resulted in racially identifiable/racially isolated classes at the following schools: East Elementary, Stewart Heights Elementary, Gordon Elementary, Maple Junior High, J.V. Martin Junior High, and Dillon High.

In October 1979, OCR conducted a second Title VI compliance review and determined that Dillon County School District #2 continued to be out of compliance with Title VI because of the district's ability grouping practices, concluding that "the assignment of students to regular classes has resulted in racially identifiable classes at the East Elementary School, Gordon Elementary School, Maple Junior High School, and J.V. Martin Junior High School."

On June 6, 1980 the Director of OCR's Region IV, wrote to the Dillon County School District #2 Superintendent stating:

> Our visit on October 1, 1979, resulted in our finding your school district still in non-compliance with regard to assignment of students to regular classes in the following schools: East Elementary, Gordon Elementary, Maple Junior High, and J.V. Martin High Schools. . . . Because the time available to the Regional Office staff for negotiation under Adams v. Califano has been exhausted, this is to advise you that unless plans are presented to us to resolve these issues within 20 days of the date of this letter, we shall forward your file to our Washington Office with a recommendation that appropriate enforcement action be initiated. This could result in termination of Federal financial assistance.

On June 9, 1983, Assistant Secretary Harry Singleton wrote to the Dillon County School District #2 Superintendent stating that a third Title VI compliance review conducted in February 1982 "found that there were still a number of racially identifiable classes" and "that 64 of the total 231 classes in the district were racially identifiable (27.7%)." Assistant

Secretary Singleton concluded that "OCR has been unable to secure voluntary compliance by June 9, 1983, the date set by the court in Adams for processing unresolved cases for enforcement." The letter stated that the case will be referred "to the Department of Justice unless an acceptable remedial plan is provided to OCR within ten days from the date of this letter."

On June 23, 1983, Assistant Secretary Singleton wrote to Assistant Attorney General William Bradford Reynolds requesting that the Department of Justice commence judicial proceedings against Dillon County School District #2.

Eleven months later on May 24, 1984, Assistant Attorney General Reynolds wrote Assistant Secretary Singleton stating "we have concluded that no further action by this Department in this matter is warranted at this time."

Now more than a year later, Assistant Secretary Singleton has refused to take the alternative enforcement route by issuing a notice for an administrative hearing. OCR takes the position that once it "had completed its investigation and referred the matter to the Department of Justice, OCR had discharged its duties under the law. . . ." Motion To Dismiss, Adams v. Bennett.

Under the Title VI regulations, OCR has two enforcement options: referral to the Department of Justice or referral to an administrative law judge within the Department of Education. The Assistant Secretary is not absolved of his duty to enforce the law simply because the Department of Justice declined to act on a matter he referred.

Mr. Singleton has refused to act on a staff recommendation that he sign a Notice of Opportunity for Hearing.

What is even more inexplicable about Mr. Singleton's obstinancy regarding Dillon #2 is that OCR is taking enforcement action against Dillon School District #1 for the identical violation of Title VI. The only procedural difference between these two cases is that Dillon #2 was sent to the Department of Justice and subsequently returned, while Dillon #1 was referred initially to an administrative law judge.

C. Inaction On Three Other Cases Returned By The Department of Justice

Three other cases originally referred to the Department of Justice have been returned to OCR. In each case, OCR found that the complainant had been discriminated against in employment on the basis of sex. The Assistant Secretary's refusal to act on these cases has left these complainants victims of bureaucratic ping-pong and with no remedy for discrimination.

The three cases and the dates of their referral to the Department of Justice and their return to OCR are as follows:

Case and Docket No.	Referral to DOJ	Return to OCR
Malcolm-King: Harlem College Extension #02-83-2007	December 8, 1983	February 24, 1984
Anna-Jonesboro Community High School, District #81 #04-78-0043	June 23, 1983	March 5, 1984
Dayton Public Schools #15-76-0070	June 23, 1983	August 9, 1983

IV. SELL-OUT SETTLEMENTS

Discussed here are three settlements in Title VI cases where OCR accepted remedies and promises of remedies that fall far short of constitutional and statutory standards to cure _de jure_ racial segregation. Two are pupil assignment cases. The third concerns the imposition of a test for college graduation where the state has failed to upgrade traditionally black schools.

Since 1977 OCR has effectively been out of the school desegregation business, limited to doing investigations for the Department of Justice. The Eagleton-Biden amendment prevents OCR, but not the federal courts, from requiring busing to a school other than the school nearest the student's home. Prior to 1981 OCR had to refer school desegregation cases after it found a violation to the Department of Justice if there was to be a legally sufficient remedy.

The Reagan Justice Department has refused to follow Supreme Court law in school desegregation cases, choosing instead to negotiate voluntary magnet school plans despite little reason to believe they will be as effective as mandatory plans. In two Phoenix, Arizona cases, OCR has opted to negotiate its own magnet school plan, effectively capitulating to the Justice Department's position.

A. Phoenix Elementary School District #1

The Office for Civil Rights found Phoenix Elementary School District #1 (PESD) to be in violation of Title VI with respect to the assignment of black and Hispanic students to the District's schools.

Two Supreme Court decisions, Columbus Board of Education v. Penick, 443 U.S. 449 (1979) and Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979), state the legal standard to be applied in school segregation cases when districts are no longer required as a matter of state law or official policy to maintain segregation. Two questions are relevant: (1) Did the school district, prior to Brown v. Board of Education, 347 U.S. 483 (1954) operate a dual school system for black and/or Hispanic students? (2) Has the school district which operated a dual school system affirmatively acted to desegregate its schools adequately and abandoned those practices which might perpetuate or reestablish dual schools?

From May 1983 through February 1984, OCR unsuccessfully sought to obtain PESD's voluntary compliance with Title VI. On February 24, 1984, OCR issued its Letter of Findings.

1. The Findings

Until 1951 Arizona state law required the segregation of elementary school students of the "African race." OCR concluded that PESD had, prior to the 1953-1954 school year, an official policy of operating de jure segregated black schools.

OCR further found that PESD had failed to meet its legal responsibility to remediate to the maximum extent feasible the remaining consequences of segregation. In particular, PESD violated its "affirmative responsibility to see that pupil assignment policies and school construction and abandonment practices 'are not used and do not serve to perpetuate or re-establish the dual school system.'" Dayton, 443 U.S. at 538-39.

The three formerly *de jure* black schools remained "overwhelmingly" black until the late 1970s. While PESD's black student population has never risen above 23%, black enrollment at these three schools consistently averaged 80% or more through the 1975-1976 school year. One of the original *de jure* schools remains a majority black school today. In the thirty years since *Brown*, none of the three *de jure* black schools has ever had a significant number of whites.

Another indication of intentional segregation was PESD's retention of black faculty at formerly *de jure* black schools. Through the 1977-1978 school year, PESD continued its practice of assigning over 70% of all black teachers to those schools which contained almost entirely blacks and Hispanics. Until the late 1970s, more than 50% of all black teachers were assigned *only* to the three formerly *de jure* black schools. It was only when Emergency School Aid Act (ESAA) funds were denied for the 1977-1978 school year that PESD made any serious effort to integrate black teachers throughout the District.

OCR also found that PESD utilized neighborhood zone lines and optional zones to keep black students in predominantly black schools while facilitating whites' avoidance of those schools. Despite the zones drawn as part of PESD's "desegregation" plan in 1953 and zoning decisions made after 1960, the three formerly *de jure* black schools and an additional school which had become majority black remained overwhelmingly black. PESD did not strictly enforce zone attendance, thereby exacerbating segregation.

Major opportunities for desegregation have been missed by PESD. The Board decided against construction of middle schools which would have facilitated integration. Less costly proposals for magnet schools have not been acted upon.

2. The Settlement

OCR spent nearly four years investigating PESD, made four on-site visits, conducted an extensive review of documents, interviewed over 100 witnesses, and contacted or visited virtually every agency and organization within Phoenix with information relevant to the investigation. After making detailed findings of illegal conduct, OCR negotiated an unconscionable settlement that employs none of the remedies that are constitutionally required to uproot the vestiges of the *de jure* school system.

"The measure of post-*Brown* conduct of a school board under an unsatisfied duty to liquidate a dual system is the *effectiveness*, *not* the *purpose* of the actions in decreasing or increasing the segregation caused by the dual system." (Emphasis added). *Dayton*, 443 U.S. at 538. The legal remedies available to a court in a case involving *de jure* segregation are extensive. In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the Supreme Court emphasized that school authorities must use whatever techniques are necessary--rezoning, pairing, "satellite" or island zoning and pupil transportation (busing)--to achieve the greatest amount of desegregation practicable.

The settlement which OCR accepted contains no mandatory provisions that will change the status quo. The plan proposes a math/computer/science magnet school for Bethune Elementary, one of the formerly *de jure* black schools, but this is the only concrete commitment. Even that commitment is qualified by references to "budgetary constraints." Other magnet schools and special programs to further desegregation are only to be "considered," with no dates for implementation.

PESD will develop a three-year plan for improving academic achievement for all races and a plan to enhance employees' skills as part of PESD's commitment to improving the overall quality of the schools.

Other sections of the settlement merely recommit the school district to what is already in existence and *a priori* have not brought about the change necessary to dismantle the vestiges of dual schools. For example, the Gifted Students Program, which affects only 3% of each racial and ethnic group, will continue. Those pupils are transported to a special, integrated learning center, but the remaining 97% of the students and their schools remain unchanged. PESD also includes its intradistrict transfer policy, but for the first time PESD is providing transportation for those wishing to transfer. This may help integration, but no figures are provided to show that transfers will have a substantial impact on the racial composition of the schools.

The plan gives great emphasis to 14 proposed or existing district-wide integrated student activities, which PESD believes will encourage integration--spelling bees, music appreciation take-home kits, and picnics. All these programs have been rejected by federal courts as adequate desegregation measures to satisfy the duty to eliminate the dual system.

B. Phoenix Union High School District

As in the elementary school district case, the Phoenix Union High School District (PUHSD) operated a segregated high school for black students prior to 1954. But unlike the elementary school case, neighborhood schools for PUHSD would have produced more integration than the open enrollment policy consistently maintained by the school board. It was PUHSD's maintenance of the open enrollment policy in the face of clear knowledge that the policy was increasing and perpetuating racial segregation that led OCR to find the district in violation of Title VI.

The open enrollment policy was brought to an end by private litigation against the district. PUHSD was required to operate a closed-zone attendance system and to implement an Ethnic Transfer Policy under which student transfers would be allowed if they improved desegregation.

OCR concluded, however, that the court order resulting from the lawsuit did not incorporate certain commitments as to future action on attendance zone lines, implementation of the Ethnic Transfer Policy, inter-district transfers and educational programs. Although litigation had resulted in significant progress, OCR found those steps insufficient to eliminate the current effects of past discriminatory actions.

OCR accepted a settlement which commits PUHSD to take future actions with regard to student attendance patterns and educational program offerings that will increase racial/ethnic balance among the District's schools. OCR has the option to assess these actions for possible adverse impact, but if it disagrees with PUHSD, OCR is limited to filing its objections within 30 days. There is no commitment to seek enforcement action if PUHSD takes actions which fail to comply with Title VI.

In addition, the OCR settlement lists several magnet programs, economic incentives for the Ethnic Transfer Policy, improved academic achiement for all students, and a series of immediate and future implementation provisions. Because the settlement modifies PUHSD's policies affecting student assignment, the District wanted the settlement to be part of an order of the federal district court.

Consequently, OCR referred PUHSD to the Department of Justice on April 22, 1985, and a month later the Civil Rights Division simultaneously filed suit against PUHSD and entered into a consent decree. That decree adopts most of the OCR settlement but puts the Civil Rights Divison, not OCR, in charge of monitoring its implementaton. Only if the Justice Department does not object to future actions of the school district under the decree will PUHSD be able to implement the action without court approval. In other words, PUHSD can get away with anything, as long as it has the Justice Department on its side.

Even more significant is the limitation of the decree to four years, or the end of the 1988-1989 school year. If PUHSD demonstrates that it has made *good faith attempts* to implement the decree, it can then apply to the court for unitary status and terminate the decree. Otherwise, the decree will remain in effect for three more years, at which time it will be dissolved permanently, irrespective of whether the District has actually eliminated the last vestiges of the *de jure* school system.

C. The Board of Regents of the University System of Georgia

This case concerns the imposition of a test as requirement for obtaining a diploma from Georgia's four-year colleges and universities when the University System continued to operate a racially separate and unequal system of public higher education and knew that the test would have a racially disproportionate affect on students in the three traditionally black institutions (TBI's).

The issue here is not whether the test itself is racially biased or whether it ought to be required for college graduation. Rather, the issue is whether the University System of Georgia (USG) violated Title VI by withholding diplomas from students attending the TBI's when it had not eliminated the separate and unequal education at the TBI's. In effect, black students were being penalized for the state's illegal conduct in depriving them of an equal education.

The Regents' Test was made a degree requirement in 1973, three years after OCR first notified Georgia that it was in violation of Title VI and was under an affirmative duty to eliminate the effects of past discrimination. In the same year, 1973, a federal court found one of the TBI's to be "academically inferior" to the traditionally white institutions. USG set the original cutoff score, again with the knowledge of its racially adverse impact. In 1978 USG raised the cutoff score, again with knowledge of its racially adverse impact.

Furthermore, OCR found that USG permitted a remedial program at one TBI that was the least intensive and briefest in the System where test results should have required one of the strongest programs.

USG attributed disparities in pass rates between black and white colleges to differences among institutions in curriculum, course content, grading standards and English requirements--all factors within the control of USG officials. But OCR found that when students who are similarly qualified at entrance, as measured by Scholastic Aptitude Test (SAT) scores, are compared, it is the type of institution--predominantly white or predominantly black--that affects student performance on the Regents' Test.

The standard courts have utilized in evaluating educational testing which has a disproportionate racial impact and the relief they have awarded should provide OCR the basis for settling the USG case. In Larry P. v. Riles, 495 F.Supp. 926 (N.D. Cal. 1979), aff'd, No. 80-4027, slip op. (9th Cir. Jan. 28, 1984), the district court found intentional segregation of black students in educable mentally retarded classes and enjoined the state from further use of the test until the court was assured that the test was not racially biased and would be administered so as not to have a discriminatory impact. In *Debra P.* v. *Turlington*, 474 F.Supp. 244 (M.D. Fla. 1979) *rev'd in part*, *on other grounds*, 644 F.2d. 397 (5th Cir. 1981) the court enjoined the use of a test for high school graduation in Florida until black students had attended desegregated schools for 12 years.

Under those applicable legal standards, OCR should have required USG not to deny diplomas based on the test as long as the state maintained unequal educational opportunities and inferior remediation programs at the TBI's. To require remediation alone is to continue penalizing students at the TBI's for the inferior education the state offers at those institutions.

The settlement which OCR accepted was premised on the understanding that USG would "immediately and vigorously" implement improved practices and procedures for the Regents' Test, as well as related instruction, at the TBI's. Although students who fail the test will be provided remediation and instruction on test-taking techniques prior to their retaking the test, USG can still withhold diplomas to students at TBI's who are unable to pass.

Georgia remains under a concomitant obligation to meet fully its commitments in the state-wide plan for dismantling the *de jure* system of public higher education, as required by the March 24, 1983 order in *Adams* v. *Bell*.

V. DATA COLLECTION TO ENSURE COMPLIANCE WITH CIVIL RIGHTS LAWS

The Department of Education Organization Act, § 203.c.1 authorizes the Assistant Secretary "to collect or coordinate the collection of data necessary to ensure compliance with civil rights laws within the jurisdiction of the Office for Civil Rights."

A. The Elementary and Secondary Civil Rights Surveys

Since 1966 OCR has collected school enrollment and other data by race, and subsequently by sex, disability and English-language proficiency. In 1979 OCR conducted the first comprehensive survey of vocational schools. (The history of the OCR 101/102 and the OCR 203 is set forth more fully in Appendix A to this testimony.)

The surveys are essentially a management tool to assist in selecting school systems or institutions for agency-initiated compliance reviews. With limited resources and thousands of school systems, OCR should target those recipients with the highest probability of compliance problems (as reflected in statistical reports).

Historically the OCR surveys were designed to collect data for federal compliance purposes but with a minimum of burden to local and state officials who were asked to provide the numbers. In order to strike the appropriate balance between those two goals, OCR would have to survey a sample of respondents in each biennial survey so that over the course of several surveys every school system would be included at least once. That permitted OCR to have a universe, or census, from which to select samples.

That appropriate balance was struck in the 1978/1980/1982 survey cycle. The vociferous opposition to OCR's controversial surveys died down, and respondents became accustomed to the regularity and predictability of the OCR 101 and 102.

For the 1984 Elementary and Secondary School Survey, OCR chose to abandon the accepted, rolling sample of the universe of districts and adopted a stratified, random sample of districts. Large systems could sample schools within the district. This methodology was adopted over the strenuous objections of the Council of Chief State School Officers and the NAACP Legal Defense Fund.

These two methodological changes are sufficient to impair the utility of the data. (See Appendix A for a fuller discussion of the major consequences of the 1984 survey design.) Because of the change in the sample, the universe will rapidly become out of date, thus necessitating a census of all districts by 1990. America's public school enrollment, especially the ethnic character of students in the large districts is simply too fluid to maintain a relatively constant universe for sampling purposes.

The sub-sampling option for large districts means that thousands of students are simply not counted in the survey. In the past, OCR summed the enrollment in each school to get the total enrollment for the district. That capability is now lost. For compliance purposes, OCR cannot compare schools that do complete the survey with the total district enrollment in order to tell whether students are segregated by race, sex or disability.

B. The Vocational Education Survey

The 1979 Vocational Education Survey was administered to 10,631 schools consisting of comprehensive high schools, area vocational centers, and junior and community colleges. This was a survey of the universe of public institutions which offer vocational training. The Carl D. Perkins Vocational Education Act, P.L. 98-524 § 521, defines vocational education as "programs which are directly related to the preparation of individuals in paid and unpaid employment . . . requiring other than a baccalaureate or advanced degree."

The Office for Civil Rights was mandated by the March 11, 1983 Adams order to conduct a vocational education survey in 1984 comparable to the 1979 Survey, that is a universe of public institutions. Instead, OCR chose to sample 7,450 public and private vocational schools.

The survey results are of highly questionable utility for compliance purposes. First, it yields incomplete information about schools that are related to each other by virtue of administrative control. By selecting some schools, but not others, the survey ignores feeder-patterns, that is the assignment of students to vocational schools based on the pupil's residence or attendance district. Second, the survey sample included institutions which would never be selected for review, thus rendering impossible any statistically adequate national estimates of enrollment by race, national origin, sex or handicap in various levels of vocational instruction.

1. Because vocational education is administratively organized in a different manner than elementary and secondary education, a sample will fail to include all information relevant to determining compliance problems. A simple example should illustrate this point.

In Delaware most precollegiate vocational instruction is offered in separately organized vocational school districts to which students from elementary and secondary districts are sent on a full-time or shared-time basis. The New Castle County Vocational Technical School District, serving Wilmington and New Castle County, operates three schools. Delcastle Technical High School and Hodgson Vocational High School are predominantly white. Howard Crreer Center is predominantly black. In order to make an adequate assessment of any pattern of minority, female or handicapped enrollment in this district, all three schools must be considered. The 1984 sample survey included only Delcastle and Howard.

Keep in mind that the purpose of the survey is to select sites for OCR-initiated reviews. If OCR lacks a complete picture, how can it chose one site over another? How can it tell where the highest likelihood of compliance problems is?

If the sample had picked up Hodgson Vocational High School rather than the Howard Career Center, the racial composition of vocational schools would look entirely different than it is. Indeed OCR admitted in the description of the proposed survey that "no predictive model has been developed to identify institutions that pose the highest likelihood of civil rights violations. Therefore, the sampling design has not been stratified on this basis."

2. Schools which simply did not belong in the sample were nevertheless included, a fact which reflects poorly on the competence of OCR. To cite some of the most obvious examples.

a. Bob Jones University, Greenville, South Carolina, has been ineligible for federal funds since 1967 due to its racially discriminatory policies.

b. McGraw-Hill Continuing Education Center, Washington, D.C., is a correspondence school that deals with its students only through the mail.

c. The Educational Institute is not a school at all but provides materials to individuals and organizations.

d. Banneker Model Academic High School in the District of Columbia is presumptively not a vocational school.

e. Georgetown University, American University, and George Washington University hardly fit the definition of vocational schools.

f. Associated Mennonite Bible Seminaries in Elkhart, Indiana provides professional training for leadership positions in Mennonite Churches, not vocational education.

g. Moody Bible Institute, Chicago, Illinois, received the survey form although there is no program title or code for Biblical studies.

OCR completes a small number of vocational education compliance reviews each year: 42 were closed in Fiscal Year 1983 and 20 in Fiscal Year 1984. In the four-year period between surveys, the agency may complete 100 to 120 vocational reviews. Therefore, any survey should be constructed in a manner which best targets the most suspect from a civil rights perspective. Surveying schools that clearly are inappropriate and omitting others that would provide a more complete picture of vocational education jurisdictions is going to waste investigative resources. Consequently, these reviews will do little to remedy sex, race or handicap discrimination.

VI. COMPLIANCE REVIEWS

Although the major part of OCR's workload is driven by complaints of discrimination, agency-initiated reviews have historically been used to address broader and systemic discrimination issues that typically are not raised by complainants. The precise number, location and issue of compliance reviews is discretionary. The selection of institution and school districts has been based on survey data indicating compliance problems, as well as other sources of information. The number of reviews conducted in any one year or any one region is generally inversely proportional to the number of complaints received. When there is a high number of complaint receipts, compliance reviews decline. Conversely, the number of reviews initiated will increase when complaints decline.

There are two contemporary problems with OCR's compliance reviews which merit this Subcommittee's attention. One is the random selection of compliance review sites. The second is the increasingly narrow scope of compliance reviews.

Both issues raise serious questions about OCR's claim that compliance reviews permit targeting of resources on "compliance problems that appear to be serious or national in scope" (FY 1985 Annual Operating Plan, 48602, Federal Register, Vol. 49, No. 241, December 13, 1984) and that compliance reviews are more cost effective than complaint investigations.*

A. Random Site Selection

OCR initiated an experiment in Fiscal Year 1984 of selecting sites for compliance reviews at random. Three Regions

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*"OCR's compliance activities for FY 81 were projected to cost $6 million (or $32,000 per review), with a projected total of 363,000 individuals benefitted. On the other hand, complaint investigations were projected to cost $27 million (or $13,000 per investigation), benefitting a projected total of 143,000 persons in 1981." Affidavit of Assistant Secretary for Civil Rights Harry Singleton, August 16, 1982, p. 34, in Adams v. Bell.

(II, III, and IX) will use random site selection exclusively, and two Regions (VI and VII) will use random site selections for half of their reviews. The other five regions will employ the traditional means of targeting compliance reviews. FY 85 Annual Operating Plan.

The only rationale offered for this experiment is "to determine the relative effectiveness of a statistically random compliance review site selection with the traditional form of site selection. . . ." Nowhere, at least in a publically available document, has OCR explained why it is necessary to conduct this experiment.

Random selection contradicts OCR's claim that compliance reviews target resources on problems that "appear to be serious or national scope." OCR's computer generates a list of recipients from which regional officials select a district or institution. Once having selected a site, the regional office then choses an issue, but that issue may not necessarily be a problem at the selected site. It almost amounts to blind selection. The Assistant Secretary has ordered a study of the random site selection experiment, the results of which have not been compiled.

One thing does seem clear. If compliance review sites are randomly selected, OCR will not need any survey data to select institutions with a high probability of compliance problems. Thus random site selection may be the rationale for eliminating or curtailing data collection. However, an internal study, the Survey Validation Study, which attempts to correlate the findings of compliance reviews with the survey data reported by schools and school districts tends to verify the utility of the surveys as a management tool.

While random site selection is hardly calculated to address serious or national problems, it may be one way of distributing compliance reviews more evenly among regional offices. OCR publically proclaims its attempts to achieve a geographically balanced compliance . . . program" (FY 85 Annual Operating Plan, supra, p.39 at 48603), but compliance review starts were not geographically distributed. As Table 15 from the Year-End Report for FY 1984 shows, 240 of 287 compliance review starts in FY 1983 were in half of the regional offices and 146 of the 212 starts in FY 1984 were in four of the ten regional offices.

Table 15

COMPLIANCE REVIEW STARTS BY REGION, FISCAL YEARS 1983 AND 1984

FISCAL YEARS	REGIONS										NATION
	I	II	III	IV	V	VI	VII	VIII	IX	X	
1983	16 (5%)	39 (14%)	37 (13%)	75 (26%)	5 (2%)	36 (13)	9 (3%)	12 (4%)	53 (18%)	5 (2%)	287 (100%)
1984	7 (3%)	42 (20%)	34 (16%)	11 (5%)	7 (3%)	27 (13%)	29 (14%)	8 (4%)	41 (19%)	6 (3%)	212 (100%)

Office for Civil Rights, Year End Report for Fiscal Year 1984.

2. The increasingly narrow scope of OCR compliance reviews is apparent from the Legal Defense Fund's monitoring. One example will demonstrate this trend.

On December 23, 1981, OCR Region III (Philadelphia) notified the Appoquinimink School District (Delaware) that it would conduct a Title VI, Title IX and Section 504 compliance review. Three years later the same Regional Office notified Loudon County School Division (Virginia) of a Title VI review of the Gifted and Talented Program, the Prince George County School Division (Virginia) of a Section 504 review of mainstreaming of handicapped students, and the Shikellamy School Division (Pennsylvania) of a Title IX review of home economics, industrial arts, health and physical education programs.

OCR contends that the Adams time frames have forced it to scale down reviews in order to increase compliance with the court's order. Footnote supra, p. 39. However, OCR has not claimed the extra time period. The "exceptional" category for any compliance reviews in either Fiscal Year 1983 or 1984. Furthermore, the Adams time frames are triggered by the date of the on-site visit, not the prior date when the recipient is notified of the review and asked to provide information relevant to the review.

A more plausible explanation for the increasingly narrow focus of compliance reviews is not the Adams time frames but the Supreme Court's decision in Grove City College v. Bell. Prior to that decision, a university or school system's receipt of federal funds for any purpose brought the entire entity within the scope of Title VI, Title IX and Section 504. Since that decision, OCR must narrow its jurisdiction in compliance reviews, as well as complaint investigations, to discrete parts of entities.

It is on jurisdictionally safe grounds where the gifted and talented program, the handicapped program and the vocational education program directly receives federal money.

Since the Grove City decision, OCR must forego an institution-wide or system-wide review of race, sex or handicap discrimination. Fearful of challenge to its jurisdiction, OCR has been forced to retreat into evidentiary battles over what "program or activity" received federal assistance.

Two enforcement actions taken as a result of compliance reviews demonstrate my point.

Mecklenburg County Public Schools (Virginia) was found in violation of Title VI because of its ability grouping practices in nominally desegregated schools, which practices OCR found to be educationally unjustifiable and to result in racially identifiable classes. OCR initiated administrative enforcement proceedings against Mecklenburg, but an administrative law judge dismissed the case on Grove City grounds.

That decision will deter OCR from proceeding in similar cases or will embolden other recipients to challenge OCR's compliance review activity even though the school districts in question receive thousands, even millions of federal dollars.

Pickens County, South Carolina, is a second case in point. Here, OCR found that the school district had violated Title IX because it assigned students to sex-segregated physical education classes. An administrative law judge dismissed this case on the grounds that although the district received $2 million in federal assistance, none of it was earmarked for physical education.

* * *

ATTACHMENT A

RECEIVED JUL 3 1984

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Washington State Superintendent
of Public Instruction

President-Elect
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New York Commissioner
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of Education

FRANKLIN B. WALTER
Ohio Superintendent
of Public Instruction

CAROLYN WARNER
Arizona Superintendent
of Public Instruction

Executive Director
WILLIAM F. PIERCE

MEMORANDUM

TO: Thomas Burns
Office of Intergovernmental and Interagency
Affairs, U.S. Department of Education

FROM: William F. Pierce *William F. Pierce*
Council of Chief State School Officers

Phyllis McClure
NAACP Legal Defense and Educational Fund, Inc.

RE: Office for Civil Rights Elementary and Secondary
School Civil Rights Survey (101 and 102) 1984
and proposed Vocational Education School Survey

DATE: July 2, 1984

This memorandum sets forth the joint recommendation of the Council of Chief State School Officers (CCSSO) and the NAACP Legal Defense and Education Fund, Inc. (LDF) regarding the Office for Civil Rights' (OCR) plans for conducting in 1984 both the Elementary and Secondary School Civil Rights Survey (101 and 102) and the Vocational Education School Survey (203). The memorandum is comprised of three sections. The first section is a brief explanation of the background of these surveys so that the contemporary issues may be seen in their historical perspective. The second section deals with OCR's originally announced plans for both surveys and the objections of CCSSO and LDF. The third and last section describes CCSSO's and LDF's joint recommendation to the Department for the 1984 survey and the rationale for those recommendations.

The intent of this memorandum is to set the policy framework for a Departmental decision on the conduct of the two civil rights surveys in 1984. The policy decision, however, is necessarily influenced by time.

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COUNCIL OF CHIEF STATE SCHOOL OFFICERS
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Although notice of these surveys was given by February 15, 1984 as required by the Paperwork Reduction Act, no final survey design has been approved by the Department or by the Office of Management and Budget as of the date of this memorandum. We are now just two months away from the earliest school opening in the United State and five months away from the projected reporting date of mid-November for school officials to complete the survey forms.

I. Historical Background of the OCR 101 and 102 and the OCR 103 Surveys

A. The Elementary and Secondary School Civil Rights Survey (OCR 101 and 102).

1968-1974. The OCR 101 and 102 survey was conducted annually and on a national basis from the 1967-1968 school year. During these years, Title VI of the Civil Rights Act of 1964 was the only statute enforced by OCR. In 1968, 1970, and 1972 (the "even" years survey), OCR's data collection covered approximately 8,000 school systems and 70,000 individual schools. The sample methodology was such that the larger a school district's enrollment, the higher its probability of inclusion. This assured that there was a very high coverage of minority pupils in the United States. Although these "even" year surveys did not literally cover every school district in the nation, they were statistically constructed so as to permit projections of the universe of school districts.

In the "odd" years (1969, 1971, and 1973) a smaller sample of approximately 3,000 school districts and 35,000 schools was drawn from the universe (or census) of school districts surveyed in the "even" years.

In 1974, another small survey of 3,000 school districts was conducted based on a random sample drawn from the existing universe of districts. The random sample focused on districts of "high interest" while at the same time permitting national statistical projection capability.

Two basic survey instruments were designed and remained basically the same from 1968 through 1974:

1. the School System Summary Report (101);
2. the Individual School Campus Report (102).

Once a school district was selected for the survey, every individual school in that district was covered. The 101 form provided data that was not necessarily repeated or supported by individual school data. In other words, the two forms were designed to complement each other and to provide limited verification of data.

1976. The 1976 Survey employed a much different methodology. OCR now had enforcement responsibility for Title IX of the Education Amendments of 1972 and Section 504 of the Rehabilitation Act of 1973. In order to obtain base line data on female and disabled students, OCR had to conduct a census of every district in the country. The result was that 101 was sent to all 16,000 school systems. In addition, 3,600 districts received the 102 forms. The 3,600 districts were selected by a weighted random sample that concentrated still on "high interest" districts, yet maintained the capability of providing state-by-state and national projections.

The 1976 survey was undoubtably the most massive civil rights survey of America's schools ever conducted, and it created an enormous political furor. Every school system was asked to report data on the 101 form, and school districts and schools were asked for data by sex and handicap which the federal government had never asked for before. In the wake of strong opposition from educators and Congress, the 1976 survey was cancelled only to be approved after a change of course by the Ford Administration due to strong protests from civil rights groups. 1976 is the last year in which a census of every district was taken in one survey.

1978-1982. In this period, the 101 and 102 survey was changed from an annual to a biennial survey. The surveys conducted in 1978, 1980 and 1982 differed markedly from their predecessors in content and sampling methodology. Fewer districts were surveyed and fewer questions were asked. This reduced burden reflected a decreased need for baseline data because that information was available from the 1976 survey.

The sampling methodology for the three surveys was different from the 1976 survey. The general methodology was designed to collect data from three categories of districts over a three-survey cycle so that OCR's data needs would be satisfied and respondent burden would be reduced. But the methodology also guaranteed that over three surveys, OCR would still collect data statistically sufficient to project a universe. This scheme obviated the need to conduct a "census" survey in one year yet still gave OCR the ability to draw samples of districts from a universe. Put another way, OCR would survey every school district over 300 enrollment at least once in three cycles. It therefore had the data it needed for compliance purposes, it spread the respondent burden over three surveys in a six-year cycle, and it retained statistical control over a universe of districts from which to draw samples.

The sampling methodology used in the 1978/1980/1982 surveys covered three basic categories of districts.

Category 1 - This included 1,700 districts of "high interest" to OCR and to the Department of Justice, and these school systems were surveyed each year.

Category 2 - This represented approximately 1,700 school districts in order to obtain statistical projections (e.g., handicapped, and minority students) while providing state-level and national-level estimates of all protected groups (i.e., protected by Congressionally enacted civil rights statutes).

Category 3 - This category included the 11,550 of the 16,000 school districts whose enrollment exceeded 300. By subtracting Category 1 (1,700) and Category 2 (1,700) districts, (a total of 3,400), from 11,550 and dividing by three surveys, left an estimated 2,717 districts in Category 3 to be surveyed in each year 1978, 1980 and 1982.

The other advantage to the three-survey, six-year cycle was that it established some reliability and predictability for respondents. Some school systems knew in advance that they would have to respond to OCR's data requests every two years. Other districts with enrollments in excess of 300 knew they would be surveyed at least once in six years.

The 1978, 1980 and 1982 OCR Surveys were conducted without any incident. The 1978 survey was administered to 6,049 districts and 54,000 schools. The 1980 survey was administered to 5,000 districts and 51,000 schools. The 1982 survey was completed by 3,129 districts and 29,000 schools. A pattern had been established. OCR has had no different data needs, and in fact, has reduced and simplified data requests each year.

B. The Vocational Educational School Civil Rights Survey (OCR 203)

Pursuant to the 1973 Order in Adams v. Richardson, OCR was required to establish a compliance program for vocational institutions, including a statistical survey of such schools. A 1974 survey of approximately 1,400 area vocational schools was conducted.

Plaintiffs sought a Motion for Further Relief in Adams which ultimately resulted in the Consent Order of December 1977. A 1979 survey of 10,600 vocational education schools, including area vocational schools, comprehensive high schools and junior or community colleges was required by this Consent Order. It was the first OCR survey of these schools as providers of vocational education. Community colleges had reported data on HEGIS and comprehensive high schools had reported on the 102, but never had these institutions reported vocational-specific statistics to OCR.

II. The 1984 Elementary and Secondary School Civil Rights Survey and the Vocational Education School Civil Rights Survey.

OCR's original proposal for the 101 and 102 Survey in 1984 abandoned the survey strategy of a rolling sample of the universe of districts employed in 1978/1980/1982 and adopted a stratified random sample of districts. Sub-sampling of schools within large school systems was also proposed. The 101 survey instrument would be unchanged, but there would be modifications of the school-level form, the 102. The 1984 survey would include 3,500 school districts and approximately 21,000 schools.

OCR further propose to conduct the Vocational Education Survey in the same year based on a sample of approximately 5,000 schools drawn from three different types of institutions -- comprehensive high schools, area vocational centers and junior colleges.

The proposals would have the following major consequences:

1. There is no provision for the preservation of a sampling frame in the future. Thus after a few survey cycles, the current data (whose oldest elements date from 1978) will be out of date. OCR will therefore, have to conduct a census survey sometime in the 1980's in order to update the universe of protected class enrollment counts. We believe OCR and the Department of Education will regret the choice of the random sample design it now proposes. A nationwide survey of the universe in one year is infinitely more burdensome than spreading it over three survey cycles and, as was demonstrated in 1976, will generate great political outcry about federal paperwork.

2. Omission of the high interest districts will reduce the compliance value of the data for OCR and the Department of Justice. OCR Regional Offices will no longer have data for districts they monitor. The Department of Justice which has the court-ordered monitoring responsibilities for specific school districts will similarly lack compliance information upon which it has come to rely.

3. Sub-sampling of schools within large districts reduces the utility of the survey data and reduces the coverage of minority students at no appreciable reduction of respondent burden. The sampling of every third school in the large districts would not assure even an adequate sample of elementary (or secondary) schools, especially if it were done alphabetically. There would further be no total district counts for districts included in the stratified random sample because that information is not collected on the 101 district-level form. The nation's large school systems typically generate data by centralized computer programs designed well in advance to produce information to meet their own and the state's requirements. OCR's data requests are a small part of the total . Data are generally standardized in all schools. To ask every third school to collect different information actually causes more problems for large district administrators.

4. Changes in the questions asked on the 102, no matter how few, come much too late this year. Therefore, there is little liklihood that districts will be able to provide the data. Districts that have been included in past surveys and anticipate responding in 1984 have their data collection systems geared to collect the number of pupils disciplined, not the number of discipline incidents, as OCR proposed. The same holds true for the pupil assignment question which asks for classroom data for two grades, as opposed to the one grade formerly asked.

5. The conduct of both surveys in the same year creates an unreasonable increase in burden for the comprehensive high schools that are required to complete both the 102 and the 203.

6. The sampling strategy for the 203 is fundamentally flawed. Among many other defects, the sampling design ignores some major civil rights compliance issues in vocational education. As originally conceived, the survey would yield very little useful data for OCR.

III. The Recommendation of the Council of Chief State School Officers and the NAACP Legal Defense Educational Fund.

Our joint proposal has been set out in a letter to Secretary Bell, Margaret Webster of the Education Department, and to Joseph Lackey of the Office of Management and Budget. (See Attachements)

In essence, our proposal calls for OCR to:

1. Use the 1982 101/102 survey instrument previously approved by CEIS and OMB for the 1984 survey;

2. Use in 1984 the survey sampling design that was successfully used in 1978, 1980 and 1982;

3. Postpone the Vocational Education Survey until 1985.

The ability of state and local school systems to cooperate with OCR's data collection depends on the predictability and regularity of the survey. The six-year, three survey cycle just concluded struck an equitable balance between respondents' burden and the Department's civil rights enforcement responsibilites.

The 1982 survey forms and the previous sampling strategy have already been approved by the Division of Education Information Management, the Office of Management and Budget and the CCSSO Committee on Evaluation and Information Systems. Thus, clearance could be expedited so that the time schedule for 1984 data collection and return of the forms could still be met. Because OCR's clearance packages (SF-83) have not been approved, the use of the existing forms and prior methodology is the only feasible alternative at this late date.

OCR's principal rationale for its proposed stratified random sample is that OMB has required the Department to reduce "burden hours" for its surveys, including the 101 and 102. Yet, we have been repeatedly told by the OMB clearance officer and by officials of the Division of Education Information Management that the Department has already met its goal for "burden hour" reduction and that OCR is under no mandate to reduce "burden hours" for the 101/102 Survey. We fail to understand why OCR continues to argue that it must redesign the sample in order to comply with OMB's requirement.

As we have attempted to show, OCR's proposed surveys for 1984 would greatly increase respondent burden not only for this year but for the future.

We do not believe that either OCR or the Department has given us a full and fair hearing on this important and potentially controversial issue. A meeting with the Under Secretary would serve that purpose.

Mr. **Weiss**. Mr. Landwehr.

STATEMENT OF MICHAEL E. LANDWEHR, LEGISLATIVE ANALYST, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC.

Mr. **Landwehr**. Mr. Chairman, and members of the subcommittee.

I am Michael Landwehr, legislative analyst of the Disability Rights Education and Defense Fund.

On behalf of DREDF, I would like to thank you for the opportunity to testify today on this very important matter.

Mr. **Weiss**. Mr. Landwehr, would you pull the microphone just a little closer to yourself.

Mr. **Landwehr**. Yes, sir.

I would like first to provide a context for my testimony by recounting some of my own experiences with education discrimination as a disabled child and adult.

I became disabled when I was in the seventh grade, and received home tutoring until I was able to attend school. The Chicago school district would not allow me to attend any school in the city, except one designated for the "physically handicapped."

Although my parents argued to get me into a "regular school," I was forced to enroll in the Jane A. Neil School for Handicapped Children.

I had to be carried onto the inaccessible bus to be transported out of my neighborhood to a school where I could not use my own wheelchair, but an inappropriate model provided by the school.

The bathrooms were inaccessible, and I had to be carried in and out of the bathroom. I was subjected to physical therapy which included painful shock treatment applied to my legs and other torturous procedures long since abandoned as counterproductive.

My eighth grade education there would not prepare a student for fourth grade, much less high school.

Nondisabled students also attended that elementary school. They had classrooms beyond the locked doors at the end of a hallway. They had separate buses, separate entrances, separate bathrooms, a separate lunchroom, and a separate recess area.

The only time I saw that part of the school was when I had to go there to deliver an invitation to a Christmas pageant, and it was frightening for me to enter this forbidden zone and face the stares of students my own age who had never had any interaction with children who had disabilities.

This was 1957. There were no laws then to protect me from the segregation and the ostracism, the inappropriate education and services.

Last year, 1984, I returned to that school to talk with students about disability civil rights. I was appalled to discover that students were still segregated in all respects. That door at the end of the hallway was still locked. Why has the Department of Education not investigated this school?

When I graduated from eighth grade, I dreaded attending the one and only high school in Chicago that would admit disabled student. Spalding High School had a reputation of being institutional, a warehouse that prepared students to live in nursing homes and State institutions.

Two years ago, the Department of Education held hearings on Public Law 94-142 and they chose Spalding as a site to hold those hearings because they knew that the school was accessible.

When it was pointed out to them that this was a segregated school and the disability community objected to holding hearings at an inaccessible school, the Department changed the site of the hearing, but they never did any investigation of why the school was segregated, why it was the only high school in Chicago that children who were disabled were being sent to.

My friends who attended that school came home crying at the end of their first day. Many of them did end up living in nursing homes. One of those students is a cousin of mine who has lived with her parents since graduating, and now they are no longer able to take care of her, and she is moving into a nursing home.

Educators expected nothing more of her.

Mr. Chairman, we are training our disabled children to become tax consumers when we could be training them to become taxpayers.

Hundreds of thousands of us remain incarcerated in this country in nursing homes, in State institutions, at a great cost to the freedom and dignity of the individuals, also at a great cost to a tax burdened society.

To get me into an integrated public high school, my parents uprooted the family and had to move out of the city 60 miles away, where I was allowed to attend a small town high school. I had to crawl onto a bus every day for 4 years. I had to be carried up the three steps to enter the school. I had to be carried by classmates up and down two flights of stairs several times a day, because the school refused to arrange my class schedule, move classrooms or provide any physical modifications to accommodate my disability.

They would not even widen the doorway so that I could get into the bathroom. I had to crawl or be carried in.

It would be difficult for me to convey to you the sense of humiliation and degradation a young teenager feels, asking to have to get down on his hands and knees to be able to get a high school education.

No one had ever attended that school in a wheelchair before. The principal expressed doubt, but, to his credit, he allowed me to try; and, although it was a 4-year struggle, I did get through, and the best thing I learned there was how to function socially in an integrated setting.

I had wanted to attend college, but could get no information from the high school regarding vocational education programs. The principal and superintendent told me there were no such programs, and I ended up working in my community for 4 years before I was able to go to college; and then my choices were limited.

Like most disabled students in the early 1960's, I went to the University of Illinois in Urbana, IL. There was a separate set of requirements for disabled students. We had to take an exhaustive battery of psychological tests to see if we were properly adjusted to our handicap.

We had to pass rigorous physical endurance tests, to see if we could push our wheelchairs around the campus.

No motorized chairs were allowed; nor were we allowed to have anyone assist us by pushing us up the steep ramps. One student who had a progressive neuromuscular disease died because the strenuous pushing hurried the deterioration of his muscles.

We were forced to take four semesters of physical therapy which was monitored by an instructor who cracked a bullwhip to spur our participation.

One student suffered a broken pelvis at the hands of an overzealous therapist during a stretching exercise.

Our social lives were monitored, counseling was imposed at the pleasure of the rehabilitation center. We paid a high price for the right to attend college.

In 1973 Congress passed section 504 of the Rehabilitation Act prohibiting discrimination based on disability, and we have made much progress toward integration and participation in society.

The University of Illinois has changed many of its discriminatory practices, but having a law is not enough. Spalding High School still exists in Chicago, and disabled students are still bused there. The law needs to be enforced.

In 1980, a disabled child in Barrington, IL, was preparing to attend high school in her community but her parents were told that she would have to attend a special school in another county. The parents filed a suit with OCR. The school district dug in its heels, OCR sat back on its haunches, and the disabled student was denied a free appropriate education.

Not until she was half way through her senior year in a private school did OCR resolve the case. And because OCR relied on a good faith effort by the institution which had discriminated, the school has still not fulfilled its promises made in the settlement.

Another case in Elgin, IL, involves the placement of a boy who has a learning disability. The State ordered the school district to hold a multidisciplinary conference, which it delayed for more than a year, then held the conference, refusing parent representation, and ended up with no individualized education plan and without a placement for the student.

The family, meanwhile, filed with OCR and placed its child in a local private day school. OCR negotiated a settlement which included reimbursement of tuition fees to the parents. And, now, after 2½ years, the fees have not been reimbursed, and OCR is renegotiating the settlement to reduce the fees allowed the parents.

Another case in northern Illinois involves a child with a learning disability and behavior disorders. The parent requested a due process hearing to obtain a residential placement for the child, but was denied by the State.

The school district refuses to allow him to attend school in the district. The parent filed with OCR, which said it was overloaded with cases and sent the case to Cleveland, where it is still sitting. The child, meanwhile, has been out of school for over a year.

Such cases seem to be the norm for the Office for Civil Rights. It ignores the needs of its clients by dragging out the investigation process, settling cases in ways inappropriate to the violation, relying on good faith efforts of the offending party without insisting on continuing jurisdiction.

The civil rights of disabled persons are too important to be handled in such a cavalier manner. Discrimination continues to exist, and will not be stopped until strong enforcement procedures are in place, until we create an Office for Civil Rights that cares about civil rights violations.

If I were back in Chicago, trying to get into a public high school, I am afraid I would not have much more luck than I did almost 30 years ago. The tragedy is that we now have an antidiscrimination law, and an office to enforce it; and I'll bet that I would still have to move out of the city to get an integrated education.

Mr. Chairman, I urge the committee to do whatever it can to get the Office for Civil Rights to enforce our civil rights laws.

Thank you very much.

Mr. WEISS. Thank you very much, Mr. Landwehr, for your testimony.

[The prepared statement of Mr. Landwehr follows:]

DREDF Disability Rights Education and Defense Fund, Inc.

Law, Public Policy, Training and Technical Assistance

STATEMENT

OF

MICHAEL E. LANDWEHR

DISABILITY RIGHTS EDUCATION

AND DEFENSE FUND

BEFORE THE

HOUSE INTERGOVERNMENTAL RELATIONS AND

HUMAN RESOURCES SUBCOMMITTEE

OF THE

COMMITTEE ON GOVERNMENT OPERATIONS

CONCERNING THE DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

ON

JULY 18, 1985

A not-for-profit public benefit
corporation dedicated to the
Independent Living Movement
and the Civil Rights
of Persons with Disabilities

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Mr. Chairman, and members of the Subcommittee, I am Michael Landwehr, legislative analyst of the Disability Rights Education and Defense Fund. On behalf of DREDF, I want to thank you for the opportunity to testify today. I would like first to provide a context for my testimony by recounting my own experiences with education discrimination as a disabled child and adult.

I became disabled when I was in seventh grade, and received home tutoring until I was able to attend school. The Chicago school district would not allow me to attend any school in the city, except one designated for the "physically handicapped." Although my parents argued to get me into a "regular" school, I was forced to enroll in the Jane A. Neil School for Handicapped Children. I had to be carried onto the inaccessible bus to be transported out of my neighborhood to a school where I could not use my own wheelchair, but an inappropriate model provided by the school. The bathrooms were inaccessible and I had to be carried in and out of the bathroom. I was subjected to physical therapy which included painful shock treatment applied to my legs and other torturous procedures long since abandoned as counter-productive. My eighth grade education there would not prepare a student for fourth grade, much less high school.

Non-disabled students also attended that elementary school. They had classrooms beyond the locked doors at the end of a hallway. They had separate buses, separate entrances, separate bathrooms, a separate lunchroom and a separate recess area. The only time I saw that part of the school was when I had to go there to deliver an invitation to a Christmas pageant. It was frightening to enter this forbidden zone and face the stares of students my own age who had never had any interaction with children who had disabilities.

This was 1957. There were no laws to protect me from the segregation and ostracism, inappropriate education and services. Last year I returned to that school to talk with students about disability civil rights. I was appalled to discover that students were still segregated in all respects. That door at the end of the hallway was still locked.

When I graduated from eighth grade, I dreaded attending the one high school in Chicago that would admit disabled students. Spalding High School had a reputation of being institutional, a warehouse that prepared students to live in nursing homes and state institutions. My friends who attended that school came home crying at the end of their first day. Many of them did end up in nursing homes. One of those students is a cousin of mine who has lived with her parents since graduating, and now that they are no longer able to care for her, she is moving into a nursing home. Nothing more was ever expected of her.

To get me into an integrated public high school, my parents uprooted the family and moved out of the city, sixty miles away, where I was allowed to attend a small town high school. I had to crawl onto a school bus every day for four years. I had to be carried up the three steps to enter the school. I had to be carried by classmates up and down two flights of stairs several times a day, because the school refused to arrange my class schedule, move classrooms or provide any physical modifications to accommodate my disability. They would not even widen the doorway so that I could get into the bathroom. I had to crawl or be carried in. No one had ever attended that school in a wheelchair before. The principal expressed doubt that I would make it, but to his credit, he allowed me to try it, and although it was a four-year struggle, I did make it, and the best thing I learned there was how to function socially in an integrated setting.

I had wanted to attend college, but could get no information from my high school regarding vocational education programs. The principal and superintendant told me there was no such program, and I ended up working in my community for four years before I was able to go to school. Then my choices were limited. Like most disabled students in the early 1960's, I went to the University of Illinois in Urbana, Illinois. There was a separate set of requirements for disabled students. We had to take an exhaustive battery of psychological tests to see if were properly adjusted to our "handicaps." We had to pass rigorous physical endurance tests to see if we could push our wheelchairs around campus. No motorized chairs were allowed, nor were we allowed to have anyone assist us by pushing us up the steep ramps. One student who had a progressive neuromuscular disease, died because the strenous pushing hurried the deterioration of his muscles. We were forced to take four semesters of physical therapy which waas monitored by an instructor who cracked a bull whip to spur our participation. One student suffered a broken pelvis at the hands an overzealous therapist during a stretching exercise. Our social lives were monitored, counseling was imposed at the pleasure of the rehabilitation center. We paid a high price for the right to attend college.

In 1973 Congress passed Section 504 of the Rehabilitation Act prohibiting discrimination based on disability, and we have made much progress toward integration and participation in society. But having a law is not enough. Spalding High School still exists in Chicago, and disabled students are still bused there. The law needs to be enforced.

In 1980, a disabled child in Barrington, Illinois was preparing to attend high school in her community but her parents were told she would have to attend a special school in another county. The parents filed with OCR. The school district dug in its heels, OCR sat back on its haunches, and the disabled child was denied a free appropriate education. Not until she was half way through her senior year in a private school did OCR resolve the case. And because OCR relied on a good faith effort by the institution which had discriminated, the school has still not fulfilled its promises made in the settlement.

A case in Elgin, Illinois involves the placement of a boy who has a learning disability. The state ordered the school district to hold a multi-disciplinary confrerence, which it delayed for more than a year, then held the conference, refusing parent representation, and ended up without an individualized education plan, and without a placement for the student. The family, meanwhile, filed with OCR and placed its child in a local private day school. OCR negotiated a settlement which included reimbursement of tuition fees to the parents. After two and a half years the fees have not been reimbursed and OCR is now renegotiating the settlement to reduce the fees allowed the parents.

Another case in Northern Illinois involves a child with a learning disability and behavior disorders. The parent requested a due process hearing to obtain a residential placement for the child, but was denied by the state. The school district refuses to allow him to attend school in the district. The parent filed with OCR, which said it was overloaded with cases and sent the case to Cleveland, where it is still sitting. The child, meanwhile, has been out of school for over a year.

Such cases seem to be the norm for the Office of Civil Rights. It ignores the needs of its clients by dragging out the investigation process, settling cases in ways inappropriate to the violation, relying on good faith efforts of the offending party without insisting on continuing jurisdiction.

The civil rights of disabled persons are too important to be handled in such a cavalier manner. Discrimination continues to exist and will not be stopped until strong enforcement procedures are in place, until we create an Office for Civil Rights that cares about civil rights violations.

If I were back in Chicago, trying to get into a public high school, I am afraid I would not have much more luck than I did almost thirty years ago. The tragedy is that we now have an anti-discrimination law and an office to enforce it, and I'll bet that I would still have to move out of the city to get an integrated education.

Mr. **Weiss**. We will start with the questioning, and when Ms. Greenberger arrives, we will take her testimony, and have her join the panel at that time.

First, I guess I want to start, Mr. Chambers, with the statement that you made, that under the best—I am paraphrasing—under the best of circumstances, the antidiscrimination laws and civil rights laws are not automatically enforced, that they are only enforced if there is pressure, and if complaints are filed and if legal action is taken.

And I guess that what we really are discussing here is not just the situation which exists today in this particular moment in time, and that we are not really talking only about the activities of the Office for Civil Rights during the current administration, but that we are going to be focusing on the situation as it exists today.

Is that correct?

Mr. **Chambers**. That is correct.

Mr. **Weiss**. Perhaps we ought to start off by having you, if you would, explain to us what the processes are for having the Office for Civil Rights look into discriminatory behavior, or behavior in violation of the law.

The complaint process and the compliance due process—just briefly outline that for us so we will have a context for the questioning that we undertake.

Mr. **Chambers**. I will do this generally, and then we will ask Ms. McClure and Mr. Lichtman to supplement my comments.

Mr. **Weiss**. Fine.

Mr. **Chambers**. First, I think it is good to just divide the review process into compliance review, review by OCR of practices of recipients of Federal funds generally to see whether those institutions are operating consistently with title VI and the Constitution.

And, second, the individual complaint, investigating a complaint by an individual that he or she has been discriminated against by the institution receiving Federal funds.

OCR is obligated periodically to conduct reviews, compliance reviews, by institutions; and OCR has discretion to determine the number of such reviews and when those reviews ought to be conducted.

However, OCR is governed by orders of the Court in the *Adams* litigation, requiring that it conduct those reviews within a specified period of time.

Once OCR initiates the compliance review, it is to complete those reviews within the period specified in the *Adams* order.

An individual may also file a complaint against an institution receiving Federal funds with OCR, and OCR is required again under the *Adams* litigation to conduct that review within a specified period of time.

Our basic complaint is that OCR is not conducting the compliance reviews within the period specified by the order.

Second, that in those reviews, OCR is improperly limiting the reviews that are conducted, and in the individual complaint situation OCR is not conducting those reviews within the time specified by the *Adams* order.

So, if Ms. McClure will supplement the process on procedure for both of those types of reviews——

Ms. McClure. Just let me add a couple of points to Mr. Chambers' testimony.

A complaint comes into OCR. There is a unit in every regional office that checks that complaint for completeness—that is, whether there is enough information for OCR to start an investigation, and also checks it for jurisdiction; that is, is there Federal money there?

Since the Supreme Court's decision in *Grove City*, that has become increasingly a problem for the regional offices. They actually have to trace Federal money, see if they have the jurisdiction to go in and investigate the complaint.

If the complaint is complete and they have jurisdiction, they accept the complaint; they have 15 days under the *Adams* order to answer the complaint.

And one of the reasons we got into these timeframes—the people filing complaints were never hearing from OCR.

The Office for Civil Rights, then, has 90 days to complete the investigation, and issue a letter of finding. If that letter of finding establishes a violation, another 90 days are permitted to secure corrective action.

And following that 90 days if there is still no corrective action, an additional 30 days to take enforcement action.

Now, for compliance reviews, it is just the same except that there is no acknowledgment stage, as Mr. Chambers indicated. Those are agency-initiated reviews.

Mr. Chambers. All right, Mr. Lichtman?

Mr. Lichtman. Perhaps I could just add a little bit of the historical context.

I have been connected with the *Adams* litigation since the outset in 1970, and the essence has always been the premise that justice delayed equals justice denied.

And what has been central to the case throughout is that while the agency has discretion, that discretion is not unlimited. The courts have been very careful not to impose limits that interfere with that discretion, but, on the other hand, they have balanced the rights of the individual which are denied through endless delays, and while initially there were only time constraints placed in specific cases where the agency had delayed egregiously, when the agency continued to fail to comply with those orders, back in the early seventies, the Court became increasingly involved in setting rules for all cases because that was the only way to avoid these delays.

However, it should be noted that the Court orders have always been very flexible in permitting additional time periods for complex cases, for so-called exceptional cases. The agency can except out as many as 20 percent of its cases for longer time periods. Furthermore, the orders contemplate a tolling of these time periods in certain circumstances where the delays are beyond the control of OCR. For example, a court order, or the unavailability of witnesses, that type of thing.

So that, there are built into the time rules set by the judge, which by the way have always been affirmed by the higher courts as well—there are set into these various time rules a series of exceptions and tolling provisions which provide flexibility to handle the unusual case.

Mr. **Weiss**. Mr. Lichtman, I know that the *Adams* cases are longstanding and quite complicated, but so that the record is a little bit clearer at this point, could you just very briefly describe why the *Adams* cases were brought, and what the *Adams* cases involved.

Mr. **Lichtman**. OK. Well, it really began in 1969 with a declaration by then Secretary Robert Finch and then Attorney General John Mitchell, that the administration at that time was going to take a different view on the enforcement of title VI, which had been passed 5 years earlier in 1964.

The Finch-Mitchell public declaration was that we are not going to rely on cutoffs any longer—that is a paraphrase. We are going to litigate instead.

And the trouble is that the Justice Department chose not to litigate as well, so that the result was that you had enforcement neither by the Office for Civil Rights or the Justice Department.

And at that time, the NAACP legal defense fund was aware that there were many instances in which OCR was failing to act on information that it had within its possession. It had made all sorts of findings of discrimination and simply sat on those findings.

For example, to give one example, a particularly egregious one, in 1969 and 1970, the Department had sent out letters to 10 different States, finding that they had not eliminated the vestiges of discrimination in their systems of higher education, and demanding corrective action.

Five of those States did not respond at all; five of those States came up with plans that were wholly inadequate and yet, OCR, which at that time, was funneling, and still is—that is, that a part of HEW at that time was funneling literally hundreds of millions of dollars into these recipients, did nothing with those recalcitrant States.

So, we went to court in 1970, and basically said, "The statute and indeed the Constitution make it necessary that where recipients are discriminating and the agency knows that the recipients are discriminating, the agency has an obligation to secure corrective action, or, if that is impossible, to begin enforcement proceedings which could lead ultimately to the cutoff of Federal funds."

And the case not only encompasses higher education, it encompasses elementary and secondary education. It not only encompasses race discrimination; it has come to encompass discrimination on the basis of sex and handicapped, and national origin. Other people have joined the case along the way.

And since the outset, since the earliest orders, we have had to return to court on numerous occasions over the last 15 years to secure enforcement of the basic ruling of the *Adams* court, which by the way was affirmed unanimously en banc by the entire U.S. Court of Appeals for the District of Columbia in 1973, with no review being sought in the Supreme Court.

We have had to go back continually for enforcement of the basic rule that, if the agency has information of discrimination by recipients of Federal funds, it must act upon that information in a timely fashion, and despite continuing orders by the courts—by the same court over these many years—we are still in court.

And we welcome the oversight of the committee in inducing the agency to carry out its obligation under the statute.

Mr. **Weiss**. Thank you very much. That is a good summary for us to take off from.

Ms. Greenberger, we are pleased that you found us finally. I know that is sometimes complicated.

Before you sit down, as I explained earlier, we have a tradition of asking our witnesses to swear or affirm to the veracity of their testimony, so would you raise your right hand.

[Witness sworn.]

Mr. **Weiss**. I understand that you do not have an opening statement.

Ms. **Greenberger**. That is right, Congressman Weiss.

I want to apologize, first of all, for coming late, and I will submit a written statement for the record.

Mr. **Weiss**. Fine.

STATEMENT OF MARCIA GREENBERGER, MANAGING ATTORNEY, NATIONAL WOMEN'S LAW CENTER

Mr. **Greenberger**. I appreciate very much the opportunity to testify today about the Office for Civil Rights.

My name is Marcia Greenberger. I am managing attorney of the National Women's Law Center.

The National Women's Law Center has worked on issues involving the enforcement of title IX for many years. We are counsel in the case now, *Adams* v. *Bennett*, and *Women's Equity Action League* v. *Bennett*, which I am sure you have heard testimony about, looking at this panel already.

We represent the plaintiffs concerned with sex discrimination laws, title IX enforcement in particular. We are also counsel in another law suit against Secretary Bennett, *American Association of University Women, et al.* v. *Bennett*, I brought about a year ago challenging the Department of Education Office for Civil Rights enforcement after the *Grove City College* case.

And we have monitored the Government's enforcement of title IX in many other regards as well over the years. So the subject of these hearings are of great importance to us, and I did want to make several points.

First of all, over the last few years, we have had particular concern with the Office for Civil Rights commitment, and policies and direction in enforcement of all the civil rights laws that they have jurisdiction over.

Because I am here to talk particularly about title IX, that is what I will be directing my remarks to; but I certainly want to make clear, and I am sure you have already heard in great detail that the problems go across the board, and affect all of the groups that are protected by these civil rights laws.

We, as you might tell, from the law suits that we have brought, represent a series of individuals and organizations concerned with title IX enforcement, and we have heard from these organizations, from their members, and from individuals all over the country about the serious nature of sex discrimination in schools across this country, running through every grade level, from the most—from the primary grades through graduate programs.

We have heard about the importance of title IX in eradicating problems of sex discrimination, from financial aid to intercollegiate athletics, to vocational educational.

And we have also heard about the disappointment because title IX has not lived up to its promise or the commitment that this country made to the women and girls to eliminate discrimination in schools.

The disappointment has been especially severe in the last few years. The word has gone out, very clearly, that the Office for Civil Rights finds aggressive enforcement of these civil rights laws to be unacceptable and they have taken a series of concrete steps to assure that aggressive enforcement does not take place.

And I just wanted to list a few of those particular policies that have a severe disadvantage on enforcement of title IX and the other laws at issue.

First of all, the Office for Civil Rights has simply discontinued collecting a lot of information about what the regions do; and therefore they are in a very fortunate position from their perspective of simply having no idea of what the problems are, what the policies are across the regions, what is going on in their own office.

So if there is not enforcement, they simply do not know about it.

Of course, if there is enforcement and if a region does want to pursue enforcement that has to go to headquarters.

So they are—they have put themselves in a position where they do not know anything about nonenforcement, but are in a position to put a damper on enforcement activities if they were to go forward.

Second, a policy that has been in place over the last several years has been to simply stop issuing letters of findings that find violations of the law.

The normal practice and procedure in the past had been to conduct an investigation if a violation was found to issue a letter which details what the problems were, what the violations were, and to attempt to conciliate and to negotiate a solution to these problems; and to reach an agreement with the school as to the steps it will take to eliminate the violation of the law at issue.

The current policy of the Office for Civil Rights is simply to dispense with this finding of violation, will find the school in compliance with the law, and list a number of things that the school may agree to do to reach compliance.

But in the meantime they are found in compliance; there is not a detailed statement of what the problems were with the bottom line of noncompliance, and that obviously shifts the ability of community groups and employees and students in schools to have a clear sense of what the obligations were of the school, and what their obligations are in the future.

In addition, because so much emphasis is placed on these promises as to what the school will do in the future, one would think monitoring other schools' activities to ensure that they live up to these commitments would take a high priority.

In fact, monitoring of these promises is spotty at best; it is rarely done; and as a result schools across the country where they are investigated are found, in fact, to have problems, although those problems are not clearly stated. They make promises in order to continue to qualify for the receipt of Federal funds, but there is very little effort ever made to assure that those schools live up to those promises.

Fourth, we have been advised that when the Office for Civil Rights goes to do investigations either initiated on its own through what they call "compliance reviews"—and, in particular, I think, in the case of compliance reviews, although sometimes in complaints, investigations that are initiated by a particular complainant, investigations are also spotty; employees and students are often not interviewed; both sides of the story are often not secured.

The *Adams* and *Weal* orders which apply to the Office for Civil Rights have a series of provisions in them to assure that there is some fairness in the investigatory process, and to assure that students and employees are interviewed and given a chance to give their side of the story. That unfortunately is often not, in fact, done in practice.

We have been given reports of complainants who have stepped forward—in fact, put themselves in jeopardy of retaliation, which has been a serious problem over the years, when there has been lax enforcement, filed the complaint with the Office for Civil Rights, asked for help, and had been met by the Office for Civil Rights with pressure to drop the complaint.

We have been told by several of our organizations that we represent in these lawsuits and even an individual plaintiff in one of these lawsuits, that they were called; they were urged to drop the complaint before it was investigated; they were urged that they were sure—the Office for Civil Rights was sure that the problems would be eliminated and that the best thing for the complainant is to simply drop it without any formal investigation, without any commitment on the part of the school that it will cease the discriminatory practices which had been the subject of the complaint.

We know of instances where the complainants have refused to drop the complaint, and we have been given reports where that complaint has been shown as having been dropped.

Another practice which leads to nonenforcement of laws it issues, that issue deals with the refusal of the leadership of the Office for Civil Rights to give guidance to the regions, as to how the particular law should be enforced and what the policies should require.

There have been a series of practices of conference calls that the Assistant Secretary for Civil Rights, Mr. Singleton, has engaged in with regional staff, where he gives directives rather than writing things down.

That policy seems to have led to confusion, to inaction, to inconsistency, all to the detriment of the groups in this country that are supposed to be protected by the civil rights laws at issue.

Now, this—what I will call in a kind way, informal practice, is particularly serious in light of the *Grove City College* case. That case decided a year ago February turned civil rights enforcement, and, particularly, certainly given what I will be testifying and have been testifying about title IX enforcement on its head, all because the administration shifted positions in the Supreme Court in the

Grove City College case. It urged for the first time, as I am sure you know that title IX coverage was more limited than it had ever been in the manner that—far more limited than it had ever been enforced in the past.

Pursuant to this ruling, it was necessary to trace Federal funding directly to a particular program before—within a school before that program would be deemed to be covered by title IX.

The *Grove City College* case, in particular, dealt with student financial aid in a college, an undergraduate college that received no other Federal funding; and, as I am sure you know, the Supreme Court held that only the student aid office was covered even though the financial aid flowed throughout the entire budget of the college.

And, as a result, *Grove City College* and many other colleges like it do not have to comply with title IX except for the manner in which they give out financial aid.

And, as I am sure you also know, that restrictive policy has now been applied to the other civil rights laws as well.

Well, the question immediately arose after *Grove City College* as to what the policy would be with respect to other kinds of Federal financial assistance in elementary and secondary schools, in postsecondary schools, in universities and colleges that received other sources of Federal financial aid.

There was great confusion. Within a week after the *Grove City College* case came down, several regions simply dropped a number of title IX complaints, in particular—and there was quite a bit of publicity around the original dropping.

There were complaints dropped against the University of Maryland, against Penn State and other schools on the grounds that in those cases intercollegiate athletics did not receive Federal financial aid directly enough to be covered after the *Grove City* decision.

There was no investigation of what kind of Federal financial aid those schools got. There was no investigation as to whether or not intercollegiate athletics was, in fact, conducted, for example, in buildings that received financial aid, and in fact in the Penn State example there was a building with a gym that was built with Federal funding.

There was no directive by the Office for Civil Rights, by Mr. Singleton or his staff, telling the regions what sort of Federal financial aid they should be looking for.

There was no directive as to what the implications would be of different kinds of aid; there was no directive as to many of these very critical and baseline legal questions that had to be answered, and regions were on their own, willy-nilly to drop complaints, to not drop complaints, to go forward with investigations, to not go forward with investigations as they saw fit.

It was this chaotic state that led the American Association of University Women, the Women's Equity Action League, the National Education Association, and others to bring a lawsuit against the Office for Civil Rights challenging this failure to enforce this inconsistent and inadequate attention paid to these serious issues after the *Grove City College* case came down.

After that lawsuit, and because of the lawsuit, Mr. Singleton promised to finally put something down in writing and tell his regions what they needed to do.

But for the first time, he sent a directive, in writing—in fact, at the insistence of the plaintiffs in this lawsuit, to the regions telling them that they should not be dropping complaints until they have investigated and saw what sort of money the schools received. That seems to be a pretty baseline principle; and he finally directed the regions to follow it.

He then also committed to decide some of these basic policy issues so that the regions would know what sort of investigations they could and could not conduct after *Grove City.*

He did issue a written policy pursuant to this commitment that he entered into as a result of the lawsuit last summer.

However, the policy did not answer and did not address some very basic questions; and to just give you one example of the basic question, the issue has arisen with respect to work study money. What is the effect for coverage of work study funds?

If, for example, students are paid 80 percent of their salary to take tickets in football games, to work in the intercollegiate athletic office, and the like, is that receipt of Federal funds under *Grove City*, or is it not?

Since work study money permeates universities and colleges, and virtually all parts of universities and colleges, the answer to that question is critical for determining what sort of coverage there is.

There has, to date, not been any answer to that question. Because of the lawsuit, these title IX complaints at least are on hold; they have not been dropped.

However, they are not going forward; they are not being investigated; the rights are not being vindicated; students are graduating; they are losing out on the opportunities to which they are entitled because the Office for Civil Rights is not meeting its obligations.

I bring out these examples purely as examples of the problems that women and girls in this country have faced in trying to get the Office for Civil Rights to enforce title IX properly.

They are severe. As I said in the beginning of my remarks, the message has been sent out loud and clear to the schools across this country, that the Government is not serious about enforcing these laws.

As a result, we begin to see backsliding all over the country, and hard-earned rights are slipping away.

Thank you very much.

Mr. WEISS. Thank you, Ms. Greenberger, and the record will be kept open, without objection, for you to submit your prepared statement.

Ms. GREENBERGER. Thank you.

Mr. WEISS. I understand Mr. Armey has a scheduling problem, as we all have, so I am going to call on him first for whatever questions that he may have.

Mr. ARMEY. Thank you, Mr. Chairman.

Let me begin by saying that I have a 21-year-old daughter who is working her way through college. I am a big fan of title IX, and I have watched this enforcement procedure. I think you have shed a lot of light on this, because I have had the feeling that perhaps when you deal with reviews that are initiated by a complainant, that the various offices of economic opportunity or civil rights officers all too often don't do the job they ought to do, which you have exemplified.

On the other hand, it seems to me they go, if you will pardon the expression, absolutely wacky when they take it upon themselves to initiate an investigation. I am wondering if there isn't a serious problem of misdirected, misguided use of resources.

I would like to tell you a story to exemplify what I am talking about.

The University of California at Berkeley was assaulted by a man named Grossman, who works for the Office of Economic Opportunity.

Mr. Grossman took a good deal of time to read the entire Berkeley catalog, identify every item of sexist language, such as "manpower," et cetera, and then brought charges against the university that they had a sexist catalog that would subtly discourage women from taking courses.

I personally was offended by that, because in my own experience, I believe women are intelligent enough to take those courses that will best advance their professional interest rather than those that are most satisfactorily described in a college catalog, which is, as you know, a gross misrepresentation on every point throughout, from start to finish.

Now, as this case proceeded, Mr. Grossman ended up tying up several offices of the university, a special committee of the faculty senate, receiving in return a complaint, if you can imagine, from the University of California at Berkeley's faculty senate that there is excessive Government intrusion. It ended up becoming something of a shared joke around the university because indeed he had failed to set the example by changing his name to "Grossperson" to begin with. [Laughter.]

But what I am suggesting is, is it possible that we can get a more effective response to those complaints?

I know of cases of sex harassment where, as you suggested, young women are advised, in their own best interests, to more or less take their lumps and don't rock the boat and I think that is tragic that they should get that kind of advice.

It should be completely intolerable, and we must have strict enforcement on that.

So, I guess the one question that I would ask you, if we can recognize that the Department does have limited resources and must use this, if you will, "person power" most effectively, would it not be better to pursue or encourage the Department to aggressively pursue the complaints and take time and energy away from what really amounts in all too many instances to self-initiated witch hunts on the part of perhaps, in this case, overzealous officers?

Is this a possibility? Could we improve the enforcement if we tried to encourage such an approach?

Ms. **Greenberger**. I think that certainly——

Mr. **Armey**. I hope you will all comment on that question.

Ms. **Greenberger**. Well, if I can start giving the comments that you made, Representative Armey, with respect to title IX, and I am very heartened to hear that you share our commitment to the importance of title IX, and also to the problems of sex discrimination in schools, such as sexual harassment, one of the distressing things, in fact, after the *Grove City College* decision, is that schools are now claiming that they are free to allow their faculty and their employees to engage in sexual harassment, without fear of violating the law.

For example, *Grove City College*—there is no law that prohibits sexual harassment against students in *Grove City College* except in the financial aid office.

Mr. **Armey**. Well, if I can just interject.

You know that the university is almost totally incapable of being governed in any way, because of something called academic freedom. Professors do what they darn well please. So——

Ms. **Greenberger**. Not in sexual harassment. That isn't something that they have academic freedom to do.

Mr. **Armey**. Well, I hope you are right, and I, for one, would like to put the hammer on these.

Ms. **Greenberger**. Well, if we get the Civil Rights Act, H.R. 700, I hope——

Mr. **Armey**. I don't think that will take care of it, but go ahead.

Ms. **Greenberger** [continuing]. That will help us.

But, in any event, to go back to the University of Berkeley example, although really all I know about that particular case is what I read in the press, I do know over the years that there have been a series of problems with Berkeley in their refusal to turn over documents with respect to investigations.

They have been very unhappy for a long period of time about—and I think they view themselves as somehow they shouldn't be bothered with investigations and with people calling in to question their hiring practices, their practices with respect to students; and they feel, I get the impression, very put upon. There is no question about that, and that has been true over the years.

With respect to catalogs, you know, it is a very interesting thing. I have a daughter who, in jest, given what her mother works on, called some of the people whose names ended in "man," "person"; and it is a great joke among her school colleagues sometimes. And I could—I had a smile when you talked about "gross person" because I could hear my daughter say the same thing, making fun of me.

I think it is really what it was. But the course catalog issue, in fact, is a serious one, perhaps not for all the undergraduates at Berkeley, but when you look at vocational education in this country, you will see 99 percent of some courses being filled by male students, 99 percent of others being filled by female students. We are seeing that problem evolving in the computer area now—the training that our young women get in this country is still very much directed to what they are told is appropriate for them.

They really don't think about broadening their horizons. And when they look at a course catalog, it may be that they don't take a lot of things seriously about what it says, and read it with a grain of salt, but when they see pictures of the male students taking some courses, and they see references to "men and boys," that just reinforces the exact message that we are hoping not to give.

And regardless of what the Berkeley course catalog said—and I did not read it, I think the description of courses is a very serious issue when we see what happens to our young women when they have to go out and earn a living for themselves and for their children.

And I think we have to take every step we can in every area, to make sure that they are encouraged, and not discouraged from broadening their horizons.

With respect to your particular question on complaints versus self-initiated reviews, the *Adams* and *Weal* orders require the Office for Civil Rights to handle every complaint that they get.

Because the groups and individuals that we represent place a major emphasis and importance on investigating those complaints, it takes an enormous amount of courage, as you recognize, to step forward and file a complaint, and to have that "deep six'd" is a very cruel injustice.

On the other hand, some of the poorest people, some of the individuals most in need of help don't file complaints. They don't think in terms of asking the Government for help.

And it is very important that the Office for Civil Rights balance out the schools and the issues that they are looking at through complaints with compliance reviews as well.

So, I think both are critical.

Mr. **Armey**. Mr. Chairman, I really do have to run, and I have stayed too late.

I want to thank you for holding the hearings. I think you have an excellent panel, and I will look forward to reading the transcript.

Mr. **Weiss**. Thanks for your participation, Mr. Armey.

Mr. Chambers, perhaps you would like to respond to the question, as well, for the record.

Mr. **Chambers**. I would only supplement the comments of Ms. Greenberger. Briefly, she has pointed out the importance of the issue in terms of various factors that would tend to steer various sexual groups in colleges and universities, which would affront various sexual groups, and I think that is important, and I think the same is true of various racial groups.

And there are two things that I would say about the main question, whether the committee should encourage the Department of Education to focus more on individuals—individual complaints rather than compliance review.

In the racial area, particularly, and not just with complaints with the Department of Education in title VI, we have noted that a number of minorities are simply afraid to pursue complaints.

And, as Ms. Greenberger just pointed out, the problem that some women have experienced who have filed complaints and are retaliated against and encouraged to withdraw any retaliation complaints.

These messages get across universities and schools and communities, and I think it would be a bad policy to ask the Department of Education to rely exclusively on individual complaints.

I think that years ago the Civil Rights Commission found that many black communities did not take advantage of freedom of choice plans because of apprehension of what those exercises would involve.

And I do not think that we can expect very effective enforcement of title VI or title IX, or section 504 by relying exclusively, or even almost exclusively, on individual complaints. I think we would leave a lot of rights violated.

The Department has discretion, as I was trying to indicate earlier, and, as indicated in my written testimony, to determine what compliance reviews to conduct.

I think that the committee can encourage the Department to be more businesslike in the way that it exercises that discretion.

We are concerned finally in that connection with some of the selectivity of the Department, in what it will cover in compliance review.

I think that what the Department is doing in attempting to carry out as many compliance reviews as possible by limiting what it will cover is—it's completely gutting title VI, because it looks at, first, very little information.

It does not gather the information that is necessary to make a determination of what is going on in the institution; nor, I submit, does it get the information necessary to determine how to exercise this discretion in selecting compliance review.

In short, I think that it is extremely important that the Department be encouraged to conduct compliance reviews and that the Department be encouraged to gather the information necessary to exercise that discretion, and to make a determination of what subject matters should be covered in the compliance review.

Mr. WEISS. I want to get Mr. Landwehr's response to the general question, too, but in the course of your introductory testimony, you suggested that the Office for Civil Rights has now moved to a "random sampling effort."

Would you explain what that shift has encompassed, and what its consequences are?

Ms. McClure.

Ms. MCCLURE. Congressman Weiss, the random site selection in the Office for Civil Rights was instituted in fiscal year 1984 as an experiment to test the effectiveness of the so-called traditional way of selecting compliance reviews, sites.

Let me explain how it used to be done—why they are instituting an experiment, I cannot explain, but they must have—Mr. Singleton must have some problem or question with how compliance review sites have been selected in the past.

The whole purpose for the Office for Civil Rights collecting data from school systems and colleges is not just a "paper exercise." It is a management tool to help the Office for Civil Rights focus precious resources on institutions and recipients of Federal funds, where there is a higher probability of compliance problems.

We do not want Federal investigators going into every college and every school system looking for something, and, therefore, in order to conserve resources over the years OCR has collected data which helped it make those decisions about where to target its compliance review efforts.

Now, we have a process instituted on an experimental basis in half of the regional offices, whereby instead of using data to select compliance reviews and other information, they will simply pick sites out of the air.

The OCR computer generates a random list of districts for every regional office. The regional office then picks districts off that computerized list. They have to justify why they are going in, and then they determine what the issue is that they will investigate.

Well, that seems to me completely backward. If the Office for Civil Rights is to be believed in its published annual operating plan that the purpose of compliance reviews is to get at serious national problems—you don't get that by picking sites randomly off a list.

Mr. WEISS. Mr. Lichtman?

Mr. LICHTMAN. Mr. Weiss—Congressman Weiss, I would like to supplement what has been said on the basic question of Congressman Armey—compliance reviews versus complaints.

He suggested that perhaps the committee should push OCR in the direction of spending more of its resources in handling complaints.

I think that a balanced enforcement program must encompass both areas. In terms of compliance reviews, I would focus on the substantive obligation of the agency under the statutes, as well as under the Constitution, to not subsidize, not have the Department of Education subsidize discrimination.

Therefore, having that obligation, it is obliged to find out where there is discrimination and to end it as the price for a continuation of Federal funding.

If there are no complaints in various areas, the obligation is no less—the obligation is therefore carried out by securing the information through data collection, and then engaging in compliance reviews.

It is a very critical function to the enforcement of the statutes as well as the enforcement of the Constitution.

On the other hand, the agency has argued in court on numerous occasions that they really don't want to do complaints any more; they would really like to devote their resources to compliance reviews; and I think balancing in that direction is equally unfortunate and pernicious because the agency must respond to complaints or we will be back to the situation we were before the Civil Rights Acts were enacted.

Pre-1964, individuals could go into court to secure enforcement of their rights at best. That is what the agency would like us to have our complainants do now. They keep saying these complainants can go into court, we have limited resources; they ought to go into court to enforce their rights.

Well, individual complainants don't have that capacity. That is why we have the funding of these agencies in part to investigate those complaints and to carry it out.

So that any real balanced enforcement must include both areas.

Mr. WEISS. Thank you.

Mr. Landwehr, would you comment on Mr. Armey's question?

Mr. LANDWEHR. Yes, I would be happy to.

The Department of Education has withdrawn now, since the Reagan administration, all funds to be used for training disabled consumers and parents of disabled kids in section 504 and the civil rights that do protect children in education.

Consequently, people don't know that there is this kind of remedy.

In Chicago, last year, I worked for a rehabilitation center. There was a 16-year-old boy who had been shot, became a paraplegic, received his rehabilitation where I worked; and when he was ready to return to school, his high school said that he could not go there, that he had to go to Spalding High School.

This child nor his parents knew that there was a remedy. They would have no way of knowing without having any disability history in the family or anything. It is not the law, the kind of law that you would be aware of.

It was only by chance that I had run into him in the hallway; and he was very disturbed. He had gone out to Spalding, had seen that he wanted to go back to high school with his friends. There were no access issues; there was not a case of asking the school to spend money to put in ramps or elevators. That school was completely wheelchair accessible; and—but there was an attitude problem; there was a discrimination problem with the high school. The principal said, "You'll be better off with people of your own kind."

Had the principal said the student would be better off and would be safer for him in an environment where he was going to be with other kids with disabilities. It is our contention that it would be better off for him to be integrated and to be back in school with his old friends, that his recovery would be more complete.

But he was not aware of the laws, and I was able to go to the high school with him, discuss it with the principal, inform him—the principal—and the student that there was a law that said that he could go there if he wanted to, and the child was allowed to attend school there.

It was a simple matter, but the problem is that the Department of Education knows that the Chicago School District segregates disabled children, and it has not done its job; it has not taken the initiative to investigate the situation; and you cannot depend on individuals who have no way of knowing anything about the law to file these kinds of complaints. It is just not going to happen.

And when we have an office whose responsibility it is was aware of the situation and they don't do anything about it—that is where the crux of the problem lies, and we need to do both.

I agree with my colleagues here. You have to handle every individual complaint, and you also have to take the initiative to prevent those kinds of complaints from becoming necessary in the future.

Mr. **Weiss**. Thank you very much.

Mr. Lichtman, Mr. Chambers, Ms. McClure, you have described the time table requirements that were built into the *Adams* case order.

My understanding is that the Office for Civil Rights has forwarded in the course of the last couple of years some 23 cases to the Department of Justice for litigation action by the Department.

Would you comment as to how that fits into this whole process of meeting the time tables of the *Adams* order?

Mr. **Lichtman**. OK. Let me begin.

Under the statute, the agency, when it finds discrimination and cannot secure corrective action through voluntary means, is obliged to begin formal enforcement proceedings. It can do that in two different ways. It can do that administratively by initiating an administrative hearing, which can lead ultimately to the cutoff of Federal funds.

Mr. **Weiss**. The administrative hearing is held before the Department itself?

Mr. **Lichtman**. That is correct, before an administrative law judge with an appeal to an appellate body within the agency and ultimately to the Secretary with final notice to the Congress, actually.

That is the administrative route. The alternative is that it can refer to the Department of Justice for civil suit, and we would, while the law is not entirely clear in this area, we would argue in that instance, the Department of Justice becomes a substitute agency for the Department of Education in securing enforcement, in preventing the discrimination from continuing.

What happened in the last year or two is that when the *Adams* court addressed itself to long delays in a large series of cases, where OCR had not brought enforcement proceedings, where OCR had found discrimination, where long delays had occurred without corrective action being secured, the *Adams* court said, "Time is up. Begin enforcement proceedings if you can't get corrective action."

And at that time, with its back to the wall, with particular deadlines set by the court, OCR initiated a series of enforcement proceedings, some administratively, and some through referral to Justice; and the 23 or so that you referred to a moment ago were part of the batch of 40 or 45 cases that were brought to enforcement because the *Adams* court said, "Time was up. The delays have been too egregious."

Some of those cases—I might add that as to the referrals to Justice, very little corrective action has been secured.

Many of them were returned to OCR by the Justice Department after 6, 12 months' delay, some of which have not yet been acted upon by OCR. Almost none of them resulted in civil litigation brought by the Department of Justice.

Many are still in limbo in the Department of Justice.

Mr. **Weiss**. And in any event, if I understand you correctly, the referral of those cases and the jurisdiction of the Justice Department is for civil litigation, civil action only.

Mr. **Lichtman**. That is correct.

Mr. **Weiss**. Not criminal action.

Mr. **Lichtman**. That is correct.

Mr. **Weiss**. Is that right?

Mr. **Lichtman**. That's right.

Mr. **Weiss**. And the civil action would entail what? If the Justice Department were, in fact, to bring litigation, what would it be seeking?

Mr. **Lichtman**. They would be seeking a cessation of the illegal conduct, not the cutoff of funds—a cessation of the illegal conduct.

And I think it would be important and very helpful for the committee to scrutinize the criteria, utilized by OCR when they determined to refer cases over to Justice, because we have looked at these batch of cases, and we see that about half of them went to

Justice, and about half of them stayed through the administrative process.

Indeed, I have questioned Mr. Singleton in a deposition on what his criteria were for choosing to send some over to Justice, and to retain others, and the only answer he has ever been able to give me is: "It depends on the facts of the case."

And when I pressed and said, "Well, what facts are crucial in determining when you refer to Justice, and when you keep it at OCR for administrative enforcement?" he continued to repeat the same refrain: "It depends on the facts of the case."

Mr. **Weiss**. So, that, again, if I understand it, the Office for Civil Rights, through administrative law judge determination within the Department has the right to cut off Federal funds, but that if it refers the matter to the Justice Department, that remedy is not available in order to cease the segregation or discriminatory activity?

Mr. **Lichtman**. Well, I don't know that the remedy is unavailable. I think traditionally the Department of Justice, when it files a civil suit, requests only injunctive relief, calling for a cessation of the illegal conduct.

Whether Justice has the option to also request the cutoff of funds, is something, I think, that has not been decided.

Mr. **Weiss**. They have never done so?

Mr. **Lichtman**. But in practice I don't think they ever do it.

Mr. **Weiss**. Right. Thank you very much. Mr. Walker?

Mr. **Walker**. Thank you, Mr. Chairman.

I think my information is correct here that the terms of reporting requirements under the *Adams* case for the plaintiffs, the following must be compiled twice a year:

Complaint and compliance review activities including information such as national and regional data on complaint and compliance review receipts, starts, closures, cases pending and staff productivity;

Complaint and compliance review adherence to timeframes, including information on cases processed under the normal and the exception timeframes;

Data showing how long each case remains on the enforcement activities report;

Information on letters of findings—LOF's—for complaints and compliance reviews;

Information on the number and percentage of the complaints and compliance reviews using the timeframe exception; and

Information on complaint and compliance reviews in which the timeframes were tolled.

That's twice a year.

Once a year they are required to do quality assurance study reports for the preceding year;

Budget figures proposed by OCR to ED, proposed by ED to OMB, and approved by OMB for the following fiscal year;

The final appropriation for OCR for the preceding fiscal year, and the total amount of that appropriation expended at the end of the fiscal year; and

Staffing data for OCR for the preceding fiscal year and projected for the forthcoming fiscal year, including staff ceiling, number of positions filled, and the number of positions vacant.

If ever there was a redtape manufacturer's dream world, this is a pretty good way of describing it.

And my question is, for some of you who are directly involved: Do you ever give any thought to whether or not the resources devoted to complying with that kind of redtape requirement could be better used investigating complaints or conducting compliance reviews; and would it not be more effective to use available resources to do something other than filling out reports?

Mr. **Lichtman**. Let me try to respond by placing this in context.

The reporting provisions that you have been talking about are, first of all, provisions that were agreed to by the Department of HEW. These latest provisions, in 1983, are essentially the same as those that were agreed to by the Department representative in negotiations that resulted in a consent decree in 1977—at that time, the Carter administration—and very similar to the reporting provisions that were agreed to by the representatives of the Department in 1976 when another consent decree was entered into—that was the Ford administration.

So, both Republicans and Democrats, at different points, have essentially agreed to these provisions.

Now, that is just the context.

Mr. **Walker**. Well, let me just say to you, and I will let you finish, but let me just say to you on that point——

My experience with both Republican and Democrat bureaucrats is that bureaucrats would much rather write reports than do real work——

Mr. **Lichtman**. These aren't——

Mr. **Walker** [continuing]. And so, my answer to that would be—that because a bunch of bureaucrats sat down and decided that they would like to have a bunch of reporting requirements, that does not give me much of an answer.

Mr. **Lichtman**. I mentioned that history, because particular provisions were not viewed as onerous provisions. The plaintiffs wanted these provisions because—you have to again remember the historical context. We sued in 1970, got relief in 1973. The same problem was occurring and had to go back to court in 1974.

We got a second order in 1975; the same problems were reoccurring and had to go back to court again.

The only way you can—plaintiffs in these litigations can monitor what these agencies are doing—and here we had a history of noncompliance with court orders, is to have the data with which to do the monitoring.

So that is what the reporting is directed toward. You specifically mentioned, for example, certain data relating to resources of the agency—certain budgetary requests and things like that.

Well, that is because the defendants were saying to the plaintiffs in court that we don't have the resources to do the job.

So, the plaintiff said, "Well, give us some information about that, and when we look at that information, we will be able to see whether this defense makes any sense."

And all of these—these provisions that you have talked about, have either been agreed to by the defendant or directly relate to some defense which they have raised, or directly relate to something that the plaintiffs need in order to monitor what the defendants are doing.

We would like nothing better than to see those very same resources going entirely into enforcement, but the sad story is that despite 15 years of litigation, the nonenforcement continues, and therefore we welcome the—not only the scrutiny of this committee, but we would like to see it become unnecessary to have these reporting provisions; but they remain necessary as long as the nonenforcement of the statutes continues.

Ms. **Greenberger**. I would like to——

Mr. **Walker**. So your specific answer to my question is that at the present time, it is a more effective use of resources to fill out reports than to do compliance?

Mr. **Lichtman**. I stand on my previous answer.

Mr. **Walker**. No, but that would——

Ms. **Greenberger**. I'd like to add——

Mr. **Walker**. No, but that was your answer.

Mr. **Lichtman**. I don't think that is a fair paraphrase of my previous answer.

Mr. **Weiss**. While you were gone, I asked Mr. Lichtman to describe to us what the onset of the *Adams* case was like, to describe to me the details of the failure of the Office for Civil Rights to enforce civil rights legislation, and it was a result of those reports——

Mr. **Walker**. Yes, I am familiar with that, Mr. Chairman, and I am familiar with the fact that there are a large number of issues that are involved in what we are dealing with here.

But the bottom line is that there are, in fact, resource questions that have to be addressed. There is no one that comes before this Congress, no one that comes before this committee that wouldn't like to have more resources for something that they are directly involved in; and that is, in fact, a legitimate kind of concern to bring to Congress.

The fact is, though, that we are dealing with finite resources, and always will be.

And so, my question, in this case, I think is a legitimate one, given the fact that there are finite resources; given the fact that those resources are not likely to be expanded significantly.

Wouldn't we be better off putting the money toward doing real work rather than redtape?

And that's what I am trying to establish here.

Ms. **Greenberger**. I wonder if I might add something, also as the lawyer—one of the lawyers who represented the plaintiffs dealing with sex discrimination in the *Women's Equity League* case, which has become connected with the *Adams* case and we are now part of the *Adams* case as well.

When we brought our case in 1974, the Office for Civil Rights had no idea what was going on. They didn't know how many complaints they had around the country; they didn't know where the compliance reviews had been started.

They didn't know whether they had been started and dropped, or lost. They lost complaints. Their recordkeeping was a disgrace; and it was part and parcel of the lack of seriousness with which they took their obligations to enforce these laws.

These records, which by the way now, are all on computer and do not require very many resources at all—these records were necessary for the Office for Civil Rights to have a clue about what was going on in their own office, to find out whether or not their complaints were being handled promptly.

To find out whether their compliance reviews were proceeding, or were falling into a black hole somewhere.

The Washington office needed this information as much as the plaintiffs did, and that is precisely why, as Mr. Lichtman said, the past administrations had been willing to agree to collect it, because they had no idea what was going on, and that is precisely why the court was willing to require that it be kept.

And it is now on computer. It is a very routine matter for them to collect and report over. It is not at all burdensome.

It is really not taking enough resources, I would suspect, to deal with any significant additional compliance reviews or complaint handling, as a matter of fact.

And without those resources, the handling of complaints and compliance reviews would not really be very productive.

Ms. McClure. Congressman Walker, could I just address that question?

Mr. Walker. Just let me make one point, and then I certainly will allow you to address it, but, you know, again, my experience with so many of these things is that lawyers like lots of information. I understand that. You know, the more information lawyers have, the better they like it.

Bureaucrats love to come up with information, because, as I say, that prevents them from having to do real work; they write reports, and they give the lawyers all the information they want.

The problem with all of that is that what you get is stagnation; and it seems to me that what we are dealing with and the complaint that you are bringing before us is more or less a complaint about stagnation. What I am suggesting is that the very process may be producing the stagnation. And that is a concern, it seems to me.

Yes, I will be glad to yield.

Ms. McClure. Congressman Walker, I dare say that if you were managing a large enterprise with a $40-million budget and 900 employees, and that if you were serious about doing your job, getting the job of this enterprise done, you would have precisely that same information in order to determine what you were doing, and where your shortfalls were.

Any business has to have that kind of information, so it is simply a part of good management and shows whether you are serious about getting the job done.

Mr. Walker. Well, once again, I mean—serious about doing which job? Serious about filling out reports? Fine.

You know, I am certain that we end up with tons of paperwork, all of which then can be seen as serious effort.

My point is that if the complaints are real about the fact that the real job, the actual real work is not getting done, that piling up all that paperwork probably is a factor too.

Mr. **Chambers**. Congressman, I would just like to make a brief response to your question, and while admittedly if the bureaucracy were such that it limited the ability of the agency to carry out its responsibility, that ought to be something that the committee ought to review.

On the other hand, the committee ought to also look at what is actually involved in the compilation of the data that you are referring to, and given also be aware of what is going on in other instances, not just with the enforcement of title VI, and the need for data to evaluate what is being done.

It is not, as has been indicated, that expensive to compile the information required in the report. If one were litigating that the agency was not complying with this responsibility, one would have to get the same data that you described in the reporting provisions.

I would imagine the committee itself would want the same information that is required by the reporting provisions to evaluate how well the agency is carrying out its responsibility.

And if one looks at the basis of the lawsuit, the *Adams* litigation, one sees that that same information was what the agency had to compile in defense of the charge, and had to be compiled by the plaintiffs to demonstrate the agency's noncompliance.

So I don't—I think it is really putting up a straw purse to suggest that what is required in the reporting provision is taking away the agency's time and resources to carry out its responsibility.

Mr. **Walker**. Well, we can characterize it any way. Can anybody tell me how many pages are in one of these reports? In the semiannual report, how many pages?

Mr. **Chambers**. I am sure that there are a number of pages required to comply with all the information that is required.

Mr. **Walker**. But on the other hand, does anybody know how many pages it is?

Mr. **Chambers**. Well, I understand all the information is on a computer, and the computer can spew out the information.

Mr. **Walker**. That isn't my question. My understanding is that it is a report about this thick; isn't that right? [Indicating.]

Mr. **Lichtman**. About that thick.

Mr. **Walker**. About the same thickness I am showing here. In other words, it is a report about 2 inches thick; and it has to be done twice a year?

Mr. **Chambers**. They are all computer printouts which can be spewed out very quickly.

Mr. **Walker**. Well, you know, somebody has to put information into computers.

Mr. **Chambers**. Certainly.

Mr. **Walker**. You know that's a part of research.

Well, thank you, Mr. Chairman.

Mr. **Weiss**. Gentlemen, it is not the suggestion that the agency shouldn't keep records, is it?

Mr. **Chambers**. No.

Mr. **Walker**. I am suggesting that recordkeeping and paperwork is one of the main problems of Federal Government, and, in fact, what we may be hearing here is the fact that we are buried under tons of paperwork that may be, in fact, impeding the agency in doing its real job. I am simply raising that as one of the facts that maybe this committee ought to be aware of?

Mr. WEISS. The agency wasn't doing its real job; that's the point.

Mr. WALKER. Well, it evidently still isn't, from what we are hearing.

Mr. WEISS. That's right.

Mr. Conyers?

Mr. WALKER. Well, it may be that paperwork is a part of that problem, and that is the only point this gentleman is raising.

Mr. WEISS. They weren't doing their job before the paperwork requirement was put on them.

Mr. Conyers?

Mr. CONYERS. Well, is it all right for me to gain the floor at this point, Mr. Chairman—Mr. Weiss?

Mr. WEISS. Oh, that's fine.

Mr. CONYERS. Thank you very much, Mr. Chairman, and my colleagues on the subcommittee.

I would like to find out what brought about the need for the court to order the provisions in the first place.

Mr. LICHTMAN. You are referring to the most recent orders?

Mr. CONYERS. Well, let's start off with the earliest orders. Was that in 1973?

Mr. LICHTMAN. Yes, Congressman Conyers.

In 1973, the court initially concluded that the discretion of the agency was not unlimited. The agency had found discrimination in literally hundreds of school districts, many State systems of higher education, and failed to act on its own findings.

Mr. CONYERS. Excuse me, when you say that they found that the discretion of the agency was not unlimited, would you elaborate on that?

Mr. LICHTMAN. The agency was contending that it had total discretion to determine when to act on its own findings, when to begin proceedings to cut off Federal funds, and so forth.

The court said, "You have discretion, as any administrative agency does, but it is not unlimited. And when you have made these findings of discrimination by so many Federal recipients, at some point in time, on a timely basis, you must act on those findings, and if you don't get corrective action through voluntary means, you must commence enforcement proceedings."

Mr. CONYERS. Well, what was the Department of Education doing——

Mr. LICHTMAN. At that time——

Mr. CONYERS [continuing]. That led the court to make that statement?

Mr. LICHTMAN. At that time, of course, it was the Department of HEW, the predecessor agency. It was going through—well, you have to remember what year we are talking about. This is 1969, 1970, 1971—there was a marked departure between the enforcement process being carried out by that administration and the one that had been carried out between the passage of the statute in 1964 and 1970; and what happened as we discussed it a little bit earlier this morning, was a sharp change in policy, and the new administration chose to stop using the title VI enforcement process. It continued to gather information; it continued to make findings of discrimination, but it failed to act on those findings.

And the central holding of the court was that when the agency makes these findings and continues to subsidize the discrimination, it must begin enforcement activity if it cannot secure an end to the discrimination on a voluntary basis.

And all the subsequent orders since 1973 have been carrying out that basic theme.

We have had to return to court over and over because over and over the agency has not complied with the orders of the court.

But most of those orders, to summarize them, very briefly, have been directed toward the same achievement, namely, to secure enforcement on a timely basis, following the basic maxim that justice delayed equals justice denied.

Ms. **Greenberger**. There was a very similar history with respect to title 9, which is a part of that case now as well, where there were complaints filed, there was discrimination, and then the case simply was dropped. The school continued to get money and it continued to discriminate.

There were investigations done by the agency. They found discrimination. Again nothing was found. The school continued to get the money and they continued to discriminate.

There were cases where the agency would investigate a complaint, find there was no discrimination, but they never interviewed the complainant.

There were cases where they would go out and do an investigation and they would never talk to the students or the teachers of the school or the parents, and lo and behold, find there was no discrimination.

Mr. **Conyers**. Who was this? What part of HEW.

Ms. **Greenberger**. This was the Office for Civil Rights, and in the case of the title IX aspect of the case, which was later in time, in a filing in 1976 the Government conceded that they were not following the law and they weren't adequately enforcing title IX and they stood up in court and told the judge that they agreed they had been acting improperly. This was during the Ford Administration.

Mr. **Conyers**. They agreed that they had been acting improperly?

Ms. **Greenberger**. Yes, in the case of title IX, and so, that was the basis for the title IX order which is a part of the *Adams* case and *Women's Equity Action League* case.

So, there was a very similar, a duplicate of process that took place in that part of the case as had in the race discrimination context that had been repeated from earlier years through to that period of time as well.

Mr. **Conyers**. Now, what information or provisions are required under the court orders?

Mr. **Weiss**. Mr. Walker has a copy of it, Mr. Conyers. He just read the requirements.

Mr. **Conyers**. Well, I wasn't here and I would rather hear it from the witnesses, although my colleague and I trust each other explicitly.

Let me put the question to the witnesses.

Have you seen this?

Mr. Lichtman. No, Congressman, but we would be happy to submit the actual orders themselves which contain the reporting provisions.

Mr. Conyers. Yeah, the only thing is I've got to find out what they are now. I can't read about it after they've gone.

Mr. Lichtman. Each of them are directed—each of them are directed to get at the basic elements of the court's orders.

For example, the court has set up a series of time tables for the processing of complaints and for the conduct of compliance reviews, and so these reporting provisions enable us to see when those time frames are met by region, by basis—that is, by jurisdictional basis, aggregate and so forth.

Some of the provisions, as we mentioned before, go to particular defenses that the Government has raised over the years. At times they said they didn't have adequate resources. So we says, well, what are your resources and what are you asking for and do you have a resource problem.

Those are the types of provisions that are in the order.

Mr. Conyers. Mr. Chairman, could the witness take a moment to look over the document that you and Mr. Walker have provided.

Mr. Weiss. Of course. Would you look at that Mr. Lichtman, and tell us whether in fact the document accurately reflects what the requirements are of the *Adams* order.

Mr. Conyers. Thank you, Mr. Chairman.

Ms. Greenberger. I might say, while Mr. Lichtman is looking at the piece of paper, that the order was really designed to deal with the problems that had been proven when complaints were being dropped in midstream and they were never being carried through to completion.

What the order does is say, you must carry them through to the end, and you must do it in a timely way. You cannot simply allow a complaint to last for 5, 6, 7, 8, and 9 years, which is in fact what happened.

So, a big part of the order is to make sure that when they do things they do them fairly. That they investigate the complainants. That they investigate and ask questions of the complainant themselves and the students and employees in schools, for instance.

And, so they simply don't ask the school, did you discriminate? The school says, no. They say, fine, no discrimination. They have to do a real investigation.

And, then the final segment is to report on how they do it.

Mr. Conyers. Well, Attorney Greenberger, that sounds like the court was interested in cutting the redtape, and the crap, and the bureacracy, and getting down to business.

Ms. Greenberger. You know, I think, in fact, when Congressman Walker was talking about strangling in redtape—I'm not sure those were the words that he used—but that there are too many—that they were. That, in fact, what we had seen before these orders and before the reports were lots of papers, lots of reports being sent in, but they weren't asking the right questions. They weren't usable. They were asking things that weren't directed to any answer that anybody needed.

And, what these reports do is basically ask the right questions, so that the information that is on the paper is information you need, the court needs, the agency needs, and the outside groups that have a right to make sure these laws are enforced need.

So, they're not wasted paper. They're all very important questions that need to be answered.

Mr. CONYERS. Well, it seemed that this would be a method of expediting the process, moving things along in timely fashion, and eliminating a lot of redtape or unnecessary information, paperwork filing, which according to some, bureaucrats are inclined to prefer to do anyway.

Ms. GREENBERGER. I think that's absolutely right, and I think if we were to come in here today and your committee wanted to know what's going on with the Office for Civil Rights, is it investigating properly, and we came up and we asked all of our individuals and we each came up with 50 examples of problems you'd still want to know, oh, that's 50 problems out of a big universe. What's—you know, what's the overall picture, and we know the overall picture because of these reports.

Mr. CONYERS. Well, thank you very much.

Mr. CHAMBERS. Congressman, I would say that the answer to your question—that the objective here is to cut redtape and to enable the agency to operate more efficiently—is you're quite correct.

The objective here is to cut the redtape and to enable the agency to operate more effectively.

One of the things that we noted in some of the more recent activities of the agency is the agency is still having difficulty keeping up with what charges have been filed, when those charges were processed, et cetera.

And, the objective of the order reporting provisions was to avoid just that problem, and what is required here is absolutely necessary to make the agency efficient.

Mr. CONYERS. Well, is the document provided to me by my colleague, Mr. Walker, a fairly accurate description of the provisions required?

Mr. LICHTMAN. I would prefer to have in the record the order itself, but my brief review of these paragraphs indicates that it appears to be a fair summary of the key elements or some of the key elements in the reporting provisions.

Mr. CONYERS. OK, my final question is, how's the Department doing in terms of those required provisions under court order?

Mr. CHAMBERS. It's set out in more detail in my written statement, but we think that the Department has some major problems in complying with the order and with the responsibilities under title VI and other provisions of—that are in question here.

As we tried to point out, it's delaying still compliance review. It's delaying processing of individual complaints. It's gathering of information—is seriously flawed. It's sampling that is going on in various districts is very questionable and is based on inadequate infomation.

In short, we think that we still have many of the problems with the enforcement of title VI and title IX in section 504 that we had during—at the beginning of the *Adams* litigation.

Mr. CONYERS. Not good.

Ms. McClure. Congressman Conyers, I address your attention to page 18 of Mr. Chambers' written statement in which we have summarized the highlight of current performance based on the reporting provisions for fiscal years 1983 and 1984.

Mr. Conyers. Very, very shaky here.

Are you suggesting that the Civil Rights Compliance Department of Education may not be conforming with the court order?

Mr. Chambers. That's certainly our position, Congressman.

We think there are, as we've indicated, some major problems with OCR's discharge of its responsibility.

Mr. Conyers. You mean, that we may have to sue the Civil Rights Department of the Education Department to get them to do their job?

Mr. Chambers. Congressman, as the written statement that I submitted pointed out, that's the only way we've gotten the Department to do much of anything over the years. We started in 1969 with the *Adams* litigation because that Department then of HEW was not discharging its responsibility and we've had to go back to court continuously since that period to try to get the Department to comply with its responsibilities under the act.

Mr. Conyers. Are there any considerations to go back into court to seek further court requirements that they comply?

Mr. Lichtman. Well, we are still before the court. Two orders were issued as recently as March 1983. One relating to the time rules that we've been talking about; a second relating to State systems of higher education that we have not been focusing on. And, the latter, by the way, is quite important in that it sets a series of deadlines for the fall of 1985, and I would hope the committee would scrutinize the extent to which the agency is complying with those deadlines that are coming up shortly.

But, the Department of Justice chose to appeal one of those two orders, the one relating to these time rules.

Mr. Conyers. Is that *Bradford-Reynolds* decision?

Mr. Lichtman. The decision to appeal?

Mr. Conyers. Yes.

Mr. Lichtman. I don't know—the Civil Division is representing the Department of Justice, so I don't really know that Mr. Reynolds participated in that decision. I just don't know.

Mr. Conyers. Well, Mr. Singleton is shaking his head in back of you, so maybe it was his decision.

Mr. Lichtman. Well, at the time of the decision to appeal, Mr. Singleton was the Assistant Secretary and he would know who made that decision to appeal. Presumably various people in the Department of Justice were crucial in that determination.

But, to summarize quickly, of those two orders issued as recently as early 1983, one of them was not appealed; one was appealed. The court of appeals has not addressed the merits of the appeal. It has raised certain questions concerning standing and mootness, and we are now before the district judge on remand briefing the issues that were raised by the court of appeals.

So, the case continues and the efforts to seek enforcement continue after all these years.

Ms. Greenberger. I must say, what really happened is that we came in and said they were not complying with these orders, and the response of the Office for Civil Rights was, "We don't have to be held open to any orders. We're going to appeal and we're going to say the court can't tell us to do anything."

And, that I think is the bottom line of what Mr. Lichtman was referring to that we're all now involved in briefing.

They want the courts out of this business because they would just as soon not have that kind of added pressure.

Mr. CONYERS. I'm almost shocked.

Thank you, Mr. Chairman.

Mr. WEISS. Thank you very much, Mr. Conyers, and let me express my appreciation to the entire panel.

Thank you very much for your participation and for your involvement.

Our next witness will be the Honorable Harry M. Singleton, Assistant Secretary for Civil Rights of the Department of Education.

Mr. Singleton, if you will take your position at the witness table, we will proceed.

Mr. Singleton, as you know, it is the practice of this subcommittee to swear in all of its witnesses. If you will stand and raise your right hand.

[Witness sworn.]

Mr. WEISS. We have just received your prepared testimony, and without objection, it will be entered into the record in its entirety.

You may proceed as you wish, either to read it, to summarize it or to highlight it—whatever is most convenient for you.

Let me also indicate that because of a prior scheduling problem that I have, I will be leaving at about 11:30 for about one-half hour, but if my colleague, Mr. Conyers, is here during that period, I will ask him to assume the Chair and then we will continue right on through with the testimony.

At this point, we are ready to proceed with your testimony.

STATEMENT OF HARRY M. SINGLETON, ASSISTANT SECRETARY FOR CIVIL RIGHTS, U.S. DEPARTMENT OF EDUCATION, ACCOMPANIED BY SANDRA BATTLE, STAFF MEMBER

Mr. SINGLETON. Thank you, Mr. Chairman.

The Office for Civil Rights in the Department of Education enforces title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975.

In addition, OCR assists the Department in implementing civil rights provisions in a number of other education programs, particularly the Education of the Handicapped Act and the Vocational Education Act.

The civil rights laws OCR enforces extend to a wide range of recipients of Department assistance, including 50 State education and rehabilitation agencies and their subrecipients; 15,840 local school districts; 3,300 colleges and universities; 10,000 proprietary institutions; and other institutions, such as libraries, museums, et cetera, that receive Federal financial assistance from the Department of Education.

These laws protect any person in the United States who might be the victim of discrimination on account of race, national origin, sex, age, or handicapping condition in a program or activity that receives Federal financial assistance.

OCR relies on individual complaint investigations and broad scale compliance reviews to ensure compliance with the civil rights laws it enforces. In the past several years OCR has improved its performance dramatically in its ability to secure compliance following an investigation.

For example, at the end of fiscal year 1984, OCR had virtually eliminated its inherited backlog of cases. Even more instructive is the fact that OCR reduced significantly the average age of pending complaints from 1,297 days at the end of fiscal year 1982 to 229 days at the end of fiscal year 1984.

These data are evidence that OCR was investigating new complaints and clearing up the existing inherited backlog at the same time.

By way of further example, as of June 30, 1985, OCR has received 1,594 complaints and resolved almost an equal number, 1,570 complaints.

One reason for OCR's improved performance is drastically improved management. Another is the renewed emphasis on affording recipients an opportunity to achieve voluntary compliance with the civil rights laws where a deficiencv may have been found.

The civil rights statutes which OCR enforces require that OCR seek voluntary compliance on the part of recipients prior to initiating formal enforcement action.

Accordingly, one significant aspect of OCR's compliance program is the effort to obtain compliance voluntarily from an educational institution where a violation has been found to exist. This is in the best interest of all parties, and is the most effective enforcement route to follow.

Over the last several years, OCR has implemented a number of innovative measures in order to increase the opportunities for securing voluntary compliance.

For example, in November 1981, OCR adopted an early complaint resolution procedure. Its purpose is to facilitate the resolution of complaints by providing the parties involved with an opportunity to voluntarily resolve between themselves the issues prompting the complaint.

Under the ECR procedures, OCR does not conduct an investigation unless the parties are unable to agree.

The use of the ECR process is strictly limited. Only individual complaints where the remedy is individual in nature are eligible. ECR is not available where the complaint involves a class of individuals or where the alleged violation, if true, would require a classwide remedy.

OCR is presently evaluating its experience with ECR to determine if the process needs modification.

Another relatively recent procedure designed to enhance OCR's ability to achieve voluntary compliance is prefinding negotiations. Such negotiations occur only after OCR has completed its investigation and prepared its proposed findings.

At that point, prior to issuing its formal findings, OCR staff will meet with the recipient's representatives and present the results of

OCR's investigation, identify any problems OCR may have found, and outline what corrective action is necessary to address them.

In some cases, OCR will provide technical guidance to assist institutions to develop ways to correct problems that they may discover. If agreement is reached, OCR's final findings are drafted to reflect the fact that the recipient has achieved compliance, and a violation-corrected letter of findings is issued.

If prefinding negotiations fail, OCR continues in its efforts to obtain voluntary compliance subsequent to the issuance of any letter of finding of violation.

OCR also assists recipients and beneficiaries in voluntarily complying with the civil rights laws through a comprehensive program of technical assistance, unrelated to individual complaint or compliance activities.

This program complements OCR's compliance activities and extends the range of impact beyond those recipients which are directly involved in a complaint investigation or a compliance review. The technical assistance program encourages voluntary compliance and results in long term benefits.

In providing information about the nature of compliance, OCR's technical assistance program helps to prevent discriminatory practices and to eliminate the need for costly and time-consuming investigations.

However, as desirable as securing voluntary compliance may be, sometimes it is a goal that cannot be achieved. When OCR determines that a recipient is in violation of civil rights statutes and compliance cannot be secured through voluntary means as previously described, OCR initiates formal enforcement proceedings.

This may be accomplished by instituting administrative procedures to terminate a recipient's Federal financial assistance or by referring the case to the Department of Justice for appropriate injunctive relief.

Since 1981 OCR has initiated formal administrative enforcement proceedings seeking fund termination in 26 cases. OCR has also referred cases to the Department of Justice for appropriate action where OCR's efforts to achieve voluntary compliance have not been successful.

OCR's improved case performance has resulted in it achieving substantial compliance with the stringent requirements of the court order in *Adams* v. *Bennett*. However, despite that achievement, application of the *Adams* order remains one factor which continues to disproportionately influence OCR's operation and its allocation of resources.

The *Adams* order, first entered in 1972, is the outgrowth of a collection of lawsuits brought by civil rights groups beginning over 15 years ago. Although modified in part since first entered, its most significant requirements have not changed.

For example, the order requires that OCR investigate each submission it receives that is not patently frivolous, which could be deemed a complete complaint. Such a categorical requirement demands that OCR direct resources toward investigation of individual complaints often at the expense of planning and conducting more efficient large scale compliance reviews.

In addition, the *Adams* order mandates not only specific timeframes within which OCR must take final action to resolve each case or compliance review, but intermediate timeframes as well within which specific activities must occur in each case or review.

Experience has demonstrated that many of the *Adams* timeframes are unrealistic, in part, because of increasing case complexity.

In view of this, and for other reasons related to sound and efficient program management and to constitutional concerns, the Department opposes the continued application of the *Adams* order.

Mr. Chairman——

Mr. **Conyers**. Pardon me, I didn't hear that.

Mr. **Singleton**. Excuse me?

Mr. **Conyers**. Excuse me, I didn't hear that last statement.

Mr. **Singleton**. I stated that the Department continues to oppose the *Adams* order.

Mr. **Conyers**. Thank you.

Mr. **Singleton**. Mr. Chairman, and members of the subcommittee, since assuming my position as Assistant Secretary for Civil Rights, I have worked diligently to enable OCR to carry out more effectively and efficiently its responsibilities.

The President and the Secretary of Education are very committed to vigorous enforcement of our civil rights laws and I believe our record in the Department of Education bespeaks that fact.

Thank you.

[The prepared statement of Mr. Singleton follows:]

OPENING STATEMENT
OF
HARRY M. SINGLETON
ASSISTANT SECRETARY FOR CIVIL RIGHTS
U. S. DEPARTMENT OF EDUCATION

BEFORE

HOUSE COMMITTEE ON GOVERNMENT OPERATIONS
SUBCOMMITTEE ON INTERGOVERNMENTAL RELATIONS
AND HUMAN RESOURCES

ON THE

DEPARTMENT OF EDUCATION'S
ENFORCEMENT OF FEDERAL
CIVIL RIGHTS LAWS

JULY 18, 1985

Opening Statement of Harry M. Singleton

The Office for Civil Rights (OCR) in the Department of Education enforces Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975. In addition, OCR assists the Department in implementing civil rights provisions in a number of other education programs, particularly the Education of the Handicapped Act and the Vocational Education Act.

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OCR relies on individual complaint investigations and broad scale compliance reviews to ensure compliance with the civil rights laws it enforces. In the past several years OCR has improved its performance dramatically in its ability to secure compliance following an investigation. For example, at the end of FY 84, OCR had virtually eliminated its inherited backlog of cases. Even more instructive is the fact that OCR reduced significantly the average age of pending complaints from 1,297 days at the end of FY 1982 to 229 days at the close of FY 1984. These data are evidence that OCR was investigating new complaints and clearing up the existing inherited backlog at the same time. By way of further example, as of June 30, 1985, OCR has received 1,594 complaints and resolved almost an equal number, 1,570 complaints.

One reason for OCR's improved performance is drastically improved management. Another is the renewed emphasis on affording recipients an opportunity to achieve voluntary compliance with the civil rights laws where a deficiency may have been found. The civil rights statutes which OCR enforces require that OCR seek "voluntary compliance" on the part of recipients prior to initiating formal enforcement action. Accordingly, one significant aspect of OCR's compliance program is the effort to obtain compliance voluntarily from an educational institution where a violation has been found to exist. This is in the best interest of all parties, and is the most effective enforcement route to follow.

Over the last several years, OCR has implemented a number of innovative measures in order to increase the opportunities for securing voluntary compliance. For example, in November, 1981 OCR adopted an Early Complaint Resolution (ECR) procedure. Its purpose is to facilitate the resolution of complaints by providing the parties involved with an opportunity to voluntarily resolve between themselves the issues prompting the complaint. Under the ECR procedures, OCR does not conduct an investigation unless the parties are unable to agree.

The use of the ECR process is strictly limited. Only individual complaints where the remedy is individual in nature are eligible. ECR is not available where the complaint involves a "class" of individuals or where the alleged violation, if true, would require a class-wide remedy. OCR is presently evaluating its experience with ECR to determine if the process needs modification.

Another relatively recent procedure designed to enhance OCR's ability to achieve voluntary compliance is "pre-finding negotiations." Such negotiations occur only after OCR has completed its investigation and prepared its proposed findings. At that point, prior to issuing its formal findings, OCR staff will meet with the recipient's representatives and present the results of OCR's investigation, identify any problems OCR may have found and outline what corrective action is necessary to address them. In some cases, OCR will provide technical guidance to assist institutions to develop ways to correct problems they may discover. If agreement is reached, OCR's final findings are drafted to reflect the fact that the recipient has achieved compliance, and a "violation-corrected" letter of findings is issued. If pre-finding negotiations fail, OCR continues in its efforts to obtain voluntary compliance subsequent to the issuance of any letter of finding of violation.

OCR also assists recipients and beneficiaries in voluntarily complying with the civil rights laws through a comprehensive program of technical assistance, unrelated to individual complaint or compliance activities. This program compliments OCR's compliance activities and extends the range of impact beyond those recipients which are directly involved in a complaint investigation or compliance review. The technical assistance program encourages voluntary compliance and results in long term benefits. In providing information about the nature of compliance, OCR's technical assistance program helps to prevent discriminatory practices and to eliminate the need for costly and time-consuming investigations.

However, as desirable as securing voluntary compliance may be, sometimes it is a goal that cannot be achieved. When OCR determines that a recipient is in violation of a civil rights statute and compliance cannot be secured through voluntary means as previously described, OCR initiates formal enforcement proceedings. This may be accomplished by instituting administrative procedures to terminate a recipient's Federal financial assistance or by referring the case to the Department of Justice for appropriate injunctive relief. Since 1981, OCR has initiated formal administrative enforcement procedings seeking fund termination in 26 cases. OCR has also referred cases to the Department of Justice for appropriate action where OCR's efforts to achieve voluntary compliance have not been successful.

OCR's improved case performance has resulted in it achieving substantial compliance with the stringent requirements of the court order in Adams v. Bennett. However, despite that achievement, application of the Adams order remains one factor which continues to disproportionately influence OCR's operation and its allocation of resources. The Adams order, first entered in 1972, is the outgrowth of a collection of lawsuits brought by civil rights groups beginning over fifteen years ago. Although modified in part since first entered, its most significant requirements have not been changed. For example, the order requires that OCR investigate each submission it receives that is not patently frivolous which could be deemed a "complete complaint." Such a categorical requirement demands that OCR direct resources toward investigation of individual complaints, often at the expense of planning and conducting more efficient large scale compliance reviews. In addition, the Adams order mandates not only specific timeframes within which OCR must take final action to resolve each case or compliance review, but intermediate timeframes as well within which specific activities must occur in each case or review. Experience has demonstrated that many of the Adams timeframes are unrealistic, in part, because of increasing case complexity. In view of this, and for other reasons related to sound and efficient program management and to constitutional concerns, the Department opposes the continued application of the Adams order.

Mr. Chairman, and members of the Subcommittee, since assuming my position as Assistant Secretary for Civil Rights, I have worked diligently to enable OCR to carry out more efficiently and effectively its responsibilities. The President and the Secretary of Education are very committed to vigorous enforcement of our civil rights laws, and I believe our record in the Department of Education bespeaks that fact.

THANK YOU.

Mr. WEISS. Thank you very much, Mr. Singleton.

Tell me when you assumed the position of Assistant Secretary.

Mr. SINGLETON. I was officially sworn in as the Assistant Secretary I believe in October of 1982. However, I was on board while my confirmation was in the works as of about April of 1982.

Mr. WEISS. And, what did you do prior to that time?

Mr. SINGLETON. I'm sorry?

Mr. WEISS. What did you do prior to that time?

Mr. SINGLETON. Prior to that I was a Deputy Assistant Secretary at the Department of Commerce.

Mr. WEISS. And, for how long had you held that position?

Mr. SINGLETON. I was in that position for approximately a year.

Mr. WEISS. And, what had you done prior to coming into Government service?

Mr. SINGLETON. Well, let me—since we're on my résumé. Prior to that I was Republican chief counsel and staff director for the Committee on the District of Columbia in the House of Representatives. So, I'm very familiar with these proceedings and how they work.

Prior to that I was in private practice. I was working for a small law firm here called Covington & Burling.

Mr. CONYERS. How small is that law firm?

Mr. SINGLETON. Well, that's tongue in cheek. I'm sorry, Mr. Conyers.

Mr. CONYERS. My response was tongue in cheek, too.

Mr. WEISS. Yes, thank you very much.

I just wanted the record to have a bio of you and your credentials.

On August 2, 1984, Mr. Singleton, this subcommittee informed you by letter that it was conducting an oversight review of the Department of Education's Office for Civil Rights. The letter specifically requested access to the files of all cases referred to the Department of Justice by OCR from January 1, 1981, to the present.

On June 4, 1985, the subcommittee again requested access to all investigative files held by OCR. Access to open enforcement files has not been granted.

Why?

Mr. SINGLETON. Well, Mr. Chairman, I don't know specifically of what you speak. As far as I know, OCR has complied with your request.

Now, to the extent that we are the custodians of the files, we would certainly be happy to produce them, and I think we have done that. To the extent that a case has been referred to the Department of Justice and they have that file, I don't have custody of it. You would have to get that file from the Department of Justice.

Mr. WEISS. Now, now, wait a minute. Let me start again.

You're telling me that you refer files to the Department of Justice and there are no copies kept at the Office for Civil Rights of those files?

Mr. SINGLETON. When we refer a case to the Department of Justice for action they assume responsibility of that case, once it has been referred to them.

Mr. WEISS. Now, answer my question.

Are you telling me that once you refer a case to the Department of Justice that you do not keep a copy of the file of that case yourself?

Mr. SINGLETON. No, I don't believe that we do.

Mr. WEISS. Do you have any of your staff people here?

Mr. SINGLETON. Yes.

Mr. WEISS. Can you check with them as to that before we proceed.

Mr. SINGLETON. Sure, I'll be happy to.

[Pause.]

Mr. SINGLETON. My answer stands. We do not keep the—we do not keep copies of the files.

According to my staff, we send those files to the Department of Justice so they can have a complete record on which to make their judgment about handling the case.

Mr. WEISS. What a strange way to conduct business, I must say.

Mr. SINGLETON. That's a judgment on your part, Mr. Chairman.

Mr. WEISS. You do agree with us, do you not, that referral of these cases to the Justice Department is not for criminal prosecution, but for civil action? Is that right.

Mr. SINGLETON. That's correct. There may be some instances in which some criminal violation may be involved, but I think for the most part we're talking about civil litigation.

Mr. WEISS. Well, do you know of any instance in which any of those cases that have been referred to the Justice Department—and I think there are 23. Is that correct?

Mr. SINGLETON. I think that's about right. 22 or 23.

Mr. WEISS. Do you know of any instance in which any of those 22 or 23 cases have been referred for criminal prosecution?

Mr. SINGLETON. No, no. Not to my knowledge.

Mr. WEISS. Mr. Singleton, I'm not sure if you are familiar with the pursuit of the *Gorsuch* or *Burford* case by the Congress, the House of Representatives. If you're not, I will remind you that Ms. Gorsuch, Ms. Burford was held in contempt when she took the position that she could not in fact allow the Congress, the House of Representatives, to see cases which were open cases—that is, that were under investigation or pending investigation.

Are you familiar with that?

Mr. SINGLETON. Yes, I'm familiar with that, but I'm confused.

What are you talking about? Are you talking about open cases that we may have in our possession or are you talking about cases which we've referred to the Department of Justice?

I'm confused. Please clarify.

Mr. WEISS. I'm talking about any cases which fall within the jurisdiction of the Office for Civil Rights. You're not saying that once you've referred a matter for civil action to the Justice Department that you no longer have jurisdiction over those cases, are you?

Mr. SINGLETON. That's what I'm saying; yes.

Once I refer a case to the Department of Justice they assume jurisdiction over the case.

Mr. WEISS. OK. Mr. Singleton, recognizing at this point that you are under oath, I ask you again. I ask you again to tell me if in fact there are any copies in the Office for Civil Rights of the Department of Education of any of the cases and files which have been referred by your office to the Department of Justice?

Mr. SINGLETON. Mr. Chairman, I think I have stated that, as far as I know, as far as my staff has advised me, we do not keep copies of the files. I do not know if there are any files present in our office right now that relate to cases referred to Justice.

My staff has told me that our customary and usual policy is to refer the entire thing to the Department of Justice. Now, that's my testimony.

Now, I don't know if somewhere some attorney has squirreled away a complete complaint. I don't know that.

Mr. WEISS. Tell me, if you will, who directly was responsible for forwarding those 22 or 23 cases to the Department of Justice?

Mr. SINGLETON. Well, as the Assistant Secretary for Civil Rights I would be responsible for forwarding those cases. I signed——

Mr. WEISS. I know, you'd be responsible for everything that goes on in the office.

But, tell me who undertook the direct action of forwarding those files to the Department of Justice?

Mr. SINGLETON. I think that, at the staff level, it probably would have been the Director of the Enforcement Division.

Mr. WEISS. And what is that person's name?

Mr. SINGLETON. His name is Frank Krueger.

Mr. WEISS. Frank?

Mr. SINGLETON. Krueger.

Mr. WEISS. Spell the name for me.

Mr. SINGLETON. K-r-u-e-g-e-r.

Mr. WEISS. And, is Mr. Krueger with us today?

Mr. SINGLETON. No, I don't believe so. No, he is not here with us today.

Mr. WEISS. Would you, for the record, check with Mr. Krueger if in fact he kept copies of the files which were forwarded to the Department of Justice and submit his response to us. Will you do that?

Mr. SINGLETON. I will do that. I will check with Mr. Krueger. I will determine if in fact we have any copies of those files, and, if so, I will turn them over to the committee.

That's not a problem, Mr. Chairman.

Mr. WEISS. Before you came to these hearings today, did you ask Mr. Krueger if in fact there were copies of those files which had been turned over to the Justice Department retained by the Office for Civil Rights?

Mr. SINGLETON. No, I did not ask Mr. Krueger that question. However, other staff, subordinate staff, in other discussions told me that we did not have those files when we were going over the list of the documents that the subcommittee had requested.

Mr. WEISS. Who of your staff told you that in fact you did not have any copies of those files at the Office for Civil Rights?

Mr. SINGLETON. At the time I believe it was one of the staff members present here today, Ms. Sandra Battle, and if I'm not mistaken, I believe the Service Director, Mr. Fred Cioffi.

Mr. WEISS. Would you spell those last names for me.

Mr. SINGLETON. Well, the first one is Battle, B-a-t-t-l-e, and the second one is Cioffi, C-i-o-f-f-i.

Mr. **Weiss**. And, Ms. Battle is here?

Mr. **Singleton**. Yes, she is.

Mr. **Weiss**. Would you ask her to please come to the witness table.

Mr. **Singleton**. Sandra.

Mr. **Weiss**. Ms. Battle, before you sit down, will you please raise your right hand.

[Witness sworn.]

Mr. **Weiss**. Now, do you of your own knowledge, Ms. Battle, know if there are any copies of these 22 or 23 files that we've been discussing which have been turned over to the Department of Justice kept in the Office for Civil Rights?

Ms. **Battle**. I personally have no knowledge that the files are kept in the Office for Civil Rights. There may be specific documents in the possession of individual attorneys, but the official files were transferred to the Department of Justice, to the best of my knowledge.

Mr. **Weiss**. Yes, the official files were transferred.

The question that I asked of you is, do you know whether in fact copies have been retained in the Office for Civil Rights?

Ms. **Battle**. I have no knowledge of any copies being retained in the Office for Civil Rights.

Mr. **Weiss**. Is it possible that in fact copies are still held in the Office for Civil Rights?

Ms. **Battle**. It may be possible that there may be one or two files. I have no knowledge of that.

Mr. **Weiss**. Did you speak with Mr. Krueger who is responsible for directly fowarding these files to the Justice Department?

Ms. **Battle**. Mr. Krueger is my immediate supervisor.

Mr. **Weiss**. And, were you personally responsible for forwarding those files to the Department of Justice?

Ms. **Battle**. Me personally, no, I'm not.

Mr. **Weiss**. Who in fact personally forwarded those files to the Department of Justice?

Ms. **Battle**. I assume it's still under Mr. Krueger's direction. I wasn't personally involved.

Mr. **Weiss**. You don't know whether in fact Mr. Krueger kept copies of those files in his office. Is that right?

Ms. **Battle**. Oh, I know there are no copies of the files in his office, his personal office.

Whether in fact—there may be parts of files in offices in the Office for Civil Rights—there may be. But, he doesn't have copies of the files in his office.

Mr. **Weiss**. Do you know if in fact there are parts of those files still at the Office for Civil Rights?

Ms. **Battle**. Attorneys that work on cases may keep individual copies of documents that they worked on in their rooms as parts of their personal records. Those documents that we prepared in headquarters may be in various attorneys' offices, but they're not part of the official records for the office.

Mr. **Weiss**. How many—do you know how many attorneys worked on those 22 or 23 cases?

Ms. **Battle**. I can't guess.

Mr. WEISS. Would you say then that there are copies of each of those 22 or 23 cases in the individual offices of the individual attorneys at the Office for Civil Rights?

Ms. BATTLE. I have no way of knowing what is in the individual offices of the various attorneys, so I can't say that. I don't know their recordkeeping system for their personal files.

Mr. SINGLETON. Mr. Chairman, you also understand, of course, that each file is a compilation of a bunch of documents, of course. That there's not just one or two pieces of paper in there, but there are many documents in there constituting one file.

Mr. WEISS. Yes.

Mr. SINGLETON. OK.

Mr. WEISS. And——

Mr. SINGLETON. OK, so that an attorney may have one or two of those documents—may have one or two of those documents, but it would not constitute the official file, will not constitute even a substantial portion of the file.

Mr. WEISS. When the subcommittee started making its request on August 2, 1984, for these files, did you ask that whatever files were still present in the Office for Civil Rights be made available to the subcommittee?

Mr. SINGLETON. I don't recall what I did at that time, Mr. Chairman. My usual practice probably would have been to tell the staff person who handles congressional affairs for OCR to get the documents together, to comply with the request.

Mr. WEISS. Well, that may be your usual practice, but it is a fact, is it not, that subcommittee staff have not had a chance or access to look at any of those parts of any of those files?

Mr. SINGLETON. The files referred to the Department of Justice?

Mr. WEISS. That's right.

Mr. SINGLETON. What I'm telling you, Mr. Chairman, is that I do not have the files. I've told you that those files have been transferred to the Department of Justice.

They are the custodians of the official files that you make reference to. I don't have them. Staff tells me that we don't have them.

Mr. WEISS. We just talked about parts of those files. You just told me how it's not just one or two documents. It's a mass of documents and that some of those documents are still kept in the offices of some of the individual attorneys.

Mr. SINGLETON. Are you making a new request. Are you making a new documents request, Mr. Chairman? Are you looking for parts of files now or would you like to see the entire file?

Mr. WEISS. Mr. Singleton, we asked you starting on August 2, 1984, for all the files of all the cases referred to the Department of Justice by OCR, and then we again asked you on June 4 of this year for access to all investigative files held by OCR.

I'm not making a new request. I'm continuing to make the request that you——

Mr. SINGLETON. Then make the request of the Department of Justice, Mr. Chairman. I do not have those files.

Now, if you want me to produce for you a ragtag collection of documents that may not make any sense to you, fine, I will do that.

If you want the official file for each case referred to the Department of Justice then the Department of Justice is the appropriate place to make the request.

Mr. **Weiss**. I want you to make available to the subcommittee whatever parts of any of those files, ragtag or not, as you may describe them, which are still held in the Office for Civil Rights.

Mr. **Singleton**. We will do what we can to pull those documents together to the extent that they exist. I'm not stating that they exist. I'm saying that it is a possibility they may.

Mr. **Weiss**. When were those 22 or 23 cases of files referred to the Department of Justice?

Mr. **Singleton**. Well, that's very difficult for me to answer, Mr. Chairman. It would be over a period of years—I mean, yes, over a period of years, beginning in 1981.

I would suspect, though, that the last—last batch of cases sent to Justice may have been in September 1983. I don't think we've sent anything over there recently. If we have, it's probably a particular case that they may have expressed interest in, but I don't recall specifically at this time.

Mr. **Weiss**. Well, isn't it a fact that the bulk of those cases were referred to the Department of Justice in 1983?

Mr. **Singleton**. Yes, I think that would be a reasonable statement to say that a good many of them were referred in 1983; yes.

Mr. **Weiss**. OK, now, how many cases have been returned by the Department of Justice to the Office for Civil Rights?

Mr. **Singleton**. I think four have been returned to the Department—or to the Office for Civil Rights.

Mr. **Weiss**. And, when were those case files returned to the Office for Civil Rights?

Mr. **Singleton**. I don't know the specific dates at this point.

Mr. **Weiss**. Have you made those returned files available to the subcommittee?

Mr. **Singleton**. I don't know whether we have or not. If they were asked for they should have been.

Mr. **Weiss**. But, they were not. As a matter of fact, they were not made available to the subcommittee.

Will you in fact make them available to the subcommittee, those files which have been returned to the Office for Civil Rights?

Mr. **Singleton**. Sure. Sure, no problem.

Mr. **Weiss**. Will you request of the Department of Justice that they allow you to make copies of the files which you referred to them—of these 22 or 23 cases which they still hold, and will you then make those files available to the subcommittee?

Mr. **Singleton**. Well, I think that before I answer on the record on that I think I'd like to take that under advisement. I don't know if it would be appropriate for me to do that or whether it would be more appropriate for you to request the documents directly from Justice.

Mr. **Conyers**. What's wrong with you doing it?

Mr. **Singleton**. Well, why should I be responsible for it when I'm not the custodian of the files.

Mr. **Conyers**. Nobody asked you to be responsible for anything. He just asked you to ask them for the files.

Mr. SINGLETON. Well, I said I'd like to take that under advisement. Am I not permitted to have an opportunity to think about that, Mr. Conyers?

Mr. CONYERS. Well, not necessarily. You can think about it right now.

Mr. SINGLETON. Well, I would like to not take the time——

Mr. CONYERS. How long do you want to think about it?

Mr. SINGLETON. Give me a couple of days. Is that all right?

Mr. WEISS. Mr. Singleton, we will——

Mr. CONYERS. Over the weekend?

Mr. SINGLETON. Yes.

Mr. CONYERS. How's that? Is that all right?

Mr. SINGLETON. Give me a couple of days. I'd like to think about it. I'd like to do this in an appropriate fashion.

Mr. CONYERS. What are you going to think about?

Mr. SINGLETON. Excuse me?

Mr. CONYERS. Whether you're going to comply or not?

Mr. SINGLETON. I'm going to think about whether this is the appropriate way to do it. I'm not the custodian of those files. The Justice Department is. The Justice Department may have rules——

Mr. CONYERS. If the Justice Department doesn't want to give me the files——

Mr. SINGLETON. The Justice Department may have rules and regulations for dealing with those things.

Mr. CONYERS. They don't have to give you the files and you just report it back to the chairman.

Mr. SINGLETON. They may not.

But, that's the point. The chairman—the chairman may want to request the files directly from the Department.

Mr. WEISS. No, I'm requesting them of you, Mr. Singleton.

Mr. SINGLETON. Well, I'm not the custodian of those files.

Mr. WEISS. Mr. Singleton, I'm asking you to ask the Department of Justice to allow you to make copies of the files which you turned over to them or have them make copies for you and then make those copies available to this subcommittee. I'm asking you to do that.

I'm not going to pursue that part of the questioning at this point. We will allow you over the weekend to in fact think about it and we will then request that you return here.

I'm going to turn it over to Mr. Conyers at this point for some substantive questioning, and hopefully I will see you again when I return within about one-half hour or so. Is that all right with the gentleman.

Mr. WALKER. Is the minority going to get a chance to participate, Mr. Chairman?

Mr. WEISS. At this point I'm turning the Chair over to the gentleman from Michigan. I'm sure that he will——

Mr. WALKER. Well, we didn't get a chance to participate in all these findings that I'm now learning have been going for some months. The minority has been totally cut blind of all of that.

We keep referring to the fact that the subcommittee is doing all this work, and the fact is the minority hasn't even been brought into the business of the subcommittee and now I'm finding out all kinds of information here.

I'm wondering whether or not we're at least going to be able to ask some questions.

Mr. **Weiss**. You always are and you know that we'll lean over backwards to be courteous to one another.

Mr. **Conyers**. Do I have the Chair?

Mr. **Weiss**. Mr. Conyers, would you please assume the Chair.

Mr. **Conyers**. Thank you very much.

Mr. **Weiss**. I thank you very much.

Mr. **Conyers** [presiding]. First of all, as the acting chairman, I'd like to thank the witness for his agreement to consider over the weekend his response to the chairman's request. I think that's very fair. I think that's timely. And, I think that's very appropriate.

Now, I'd like to yield to the ranking minority member of the subcommittee for as much time as he may consume.

Mr. **Walker**. Thank you, Mr. Chairman, and I certainly appreciate that.

Just let me reiterate the point, that one of the things that does disturb me a little bit about the way we're proceeding here, and it has turned somewhat adversarial and I particularly think that it's unfortunate that at one point the witness' integrity was somewhat called into question with the statement about realizing whether or not he was under oath.

I think that the witness probably takes those oaths very seriously, as the subcommittee does.

But, in an adversarial proceeding like this, one of the things that is bothersome is that we refer to the fact that the subcommittee is conducting this investigation, and there is subcommittee work going on, and the fact is that the minority has never been brought into the subcommittee process.

This—the requests that you have had from the subcommittee have not included my signature. I have not been consulted about these matters at all as the subcommittee proceeded. And, that is not to say that there may not be very legitimate requests, and I think you have acknowledged in your testimony that there are some very legitimate requests that the subcommittee has sent down.

What I am now somewhat concerned about is the fact that I now hear those requests being extended into something that I'm not certain are appropriate. Would it be normal policy for a subcommittee of the Congress to request rummaging through the personal files of lawyers in order to come up with documentation to send to Capitol Hill?

Mr. **Singleton**. This is one of the—it's one of the things I would like to think about. It seems to me that what we have here is a far different request than that which was communicated to us previously.

Mr. **Walker**. And, if Mr. Krueger, for instance, kept files in his possession, as was asked here, do I understand that that would have been in violation of departmental policy?

Mr. **Singleton**. Well, I don't know if it would have been in violation of departmental policy, but it certainly may have been somewhat at odds with what our internal office procedures were with respect to keeping the files, the official files were supposed to be transferred.

Mr. WALKER. Well, but the reason why you're being told that they want you to come up with the files from Justice is because there may be some question as to whether or not this subcommittee can go to Justice because that's outside our jurisdictional area.

So, they're asking you to do something that this subcommittee is not prepared to do itself, it is not prepared to take the heat for.

I think we have to understand that would mean that you'd have to go over and involve another subcommittee chairman. You might have some situations over there where they might demand to understand just what's going on here, and if the minority's been kept in the dark, you can bet that some other people may have been kept in the dark along the line. I think that that's the reason why it does raise some questions and so I'm pleased to hear that you're going to take it under advisement.

I would suggest that you talk to a couple of good lawyers about it over the weekend because I think we're getting into some very questionable areas and—because I have been kept in the dark all this time—it leads me to raise some serious questions about what the intent here is.

When we start talking about open cases—since we have had a problem of this committee leaking information—not in this subcommittee necessarily, but in this Government Operations Committee—there have been leaks of information—we have the potential of information that is not readily available to people who are involved in these actions becoming public information and thereby undermining the court process.

Mr. SINGLETON. That's precisely correct, Mr. Walker, and that's one of my concerns and I've expressed that to the chairman. However, the chairman refuses to cooperate with me on that point.

I told him that I was not denying this subcommittee any documents. I tried to turn over everything that I had in my possession that I knew about, however I had one concern and that was open complaint files. Open files in which an investigation is ongoing.

I didn't deny him access to those files. I did say, however, that I was concerned about jeopardizing any ongoing investigation and I'd like to sit down and chat with you, as the ranking minority member, and he, as the chairman, about some ground rules that we might follow to protect the integrity of those files.

It's my responsibility to make sure that those investigations are seen to their fruition and I cannot risk having those ongoing investigations jeopardized by some mistakes.

The chairman refuses to meet with me—to meet with us to talk about such ground rules. He feels they are unnecessary.

Mr. WALKER. Well, I appreciate your willingness to include me in the meetings because it would have been the first time I would have been included in the meetings with regard to the development of this particular hearing, and, you know, I think maybe that—that says a little something about what's been going on here.

Mr. SINGLETON. Well, as an old staff director and chief counsel for the minority, I know how that is. [Laughter.]

So, I thought it would be appropriate to—for the minority to be involved.

Mr. WALKER. You understand the problem.

Let me ask you a couple of substantive questions, and I appreciate the gentleman from Michigan indulging me with the time here.

Do you think that one of the major differences between you and your critics on this whole issue of *Adams* compliance and the range of other issues before you is the fact that you have placed emphasis on voluntary compliance and they seem to have a real desire to see formal enforcement actions?

Mr. **Singleton**. Well, you know, it's—you have to put all of that into context. I mean, I don't—and I want to preface what I'm about to say with the statement that, you know, I'm not trying to impune anyone's integrity here or their well-meaning intentions.

But, you know, I was looking at the line that you had at the table that preceded me and they're all representative of advocacy groups for the most part. They make their living calling into question, criticizing, organizations such as mine.

If we were vigorously——

Mr. **Walker**. That's fine, we need those people too; right?

Mr. **Singleton**. That's right. I mean—but we have to put it into context and understand what it's all about.

I think that if we probably were enforcing as a sole mode 100 percent of the time they probably would be upset that we weren't using more voluntary approaches to resolve the problems. There's always something to complain about.

But, the *Adams* order, though, is—it may have been useful at one time, for a very limited period of time, for a very limited purpose, but in my judgment has gotten out of hand and has mushroomed and, among other things, has become an unnecessary interference, an unwarranted interference by the judiciary into the affairs of the executive.

Could you imagine, for example, Mr. Walker, the courts telling this subcommittee, this committee how long it had to take to work up an investigation, how long it had to take to hold hearings and when it had to report out a bill to committee—to the full committee. When the full committee had to report that bill out to the floor and then how much time the House would have to deliberate and then report that bill out?

It's a very——

Mr. **Walker**. On the budget act this year that might be an advantage.

Mr. **Singleton**. On the budget? Yes, I think that's right. [Laughter.]

But, it's a very far reaching thing, and it gets into the day-to-day management of the Office for Civil Rights, and I don't think it's necessary and I'd like to see it done away with.

Mr. **Walker**. Well, I appreciate that. But, the point I was getting to is if taking the testimony that I went through and—it seems to me that what we're really hearing from the advocacy groups here today was the fact that they are criticizing the efforts you put forward on voluntary compliance and I think you've done some very innovative things.

And, as you pointed out in your testimony, the statute requires you to go after voluntary compliance. Is that not correct?

Mr. **Singleton**. That's correct.

Mr. **Walker.** And, so that is not something that you do based upon your own choice even if that might be your personal philosophy. The statute requires you to go for voluntary compliance.

Mr. **Singleton.** Absolutely correct.

Mr. **Walker.** And, the statute was written in that way because they felt that there was a better way of doing this than simply having enforcement efforts. I guess to some extent it comes down to a question as to whether or not you want to use muscle or negotiation as the way of achieving some of these things. I'm always kind of interested to hear people who in some areas are willing to have no muscle applied to the settlement of issues and in other areas want the Federal Government to come down with full force before you have a period to try to negotiate.

In this instance, it seems to me that the very way in which you have reduced caseloads, and have reduced the backlog of caseloads shows that some of the innovative steps that have been taken on voluntary compliance have in fact worked. And, I think that you're, indeed, right that that has to be made a part of the record.

I also think that there is some need to take a look at the issue that I raised earlier, and that is that we have piled on you a burden of paperwork that in fact prevents the agency from doing some of the real enforcement work and some of the real voluntary compliance work that might settle additional cases.

And, that if in fact this subcommittee wants to do something that is more within our jurisdiction as a Government Operations Committee, maybe we ought to look at some of those kinds of problems because that's really more the jurisdiction of this committee than some of the policy related issues.

I'd be pleased to have your comments.

Mr. **Singleton.** I think that's right.

You know, I'd like to get to the point, though, that you made. If you listen to the critics you'd think that we had totally abandoned enforcement efforts when nothing could be further from the truth.

We have more enforcement actions going now than had been going on previously.

We terminated Federal financial assistance to a school district. We did that in 1982. You know the last time that was done was 1972.

The great saviors of civil rights during that period from 1977 to 1980-81, they never brought an enforcement action that went to fruition. They never terminated anyone's Federal financial assistance.

But, yet, they talk about our lack of nerve and fortitude in going forward with enforcement action when nothing could be further from the truth.

The Education Department has a fantastic record as far as enforcement actions are concerned. All you have to do is look at the statistics. I stand behind that. I'm proud of that record and I think that this subcommittee ought to be praising us for the work that we've done.

We've eliminated a backlog of cases. We've reduced the average age of complaints from over a thousand days old down to 229, and I'm not hearing any praise.

You, Mr. Chairman, should be saying, Mr. Singleton, you've done a fantastic job. Maybe you have some areas where there's a little bit of improvement needed, but, my God, this is fantastic.

But, what do I hear? They're not collecting data. They're not enforcing the law vigorously. They're taking too many voluntary settlements.

Anyway, enough said. I think that you get the idea. I think that we have done a very fine job.

Mr. **Walker**. I appreciate it. Thank you, Mr. Singleton.

Thank you, Mr. Chairman.

Mr. **Conyers**. You're more than welcome.

Did you say that I should be praising the agency?

Mr. **Singleton**. Oh, you know, Mr. Chairman, I—you know—far be it from me to put words in your mouth. I was just saying that one scenario could possibly be that you'd want to praise us for doing such a fine job.

Mr. **Conyers**. Well, I do want to praise Federal agencies.

One of my jobs is to be a national encourager of Federal action in agencies that participate in a positive social fashion or outstandingly in other ways. One of the things that—nothing makes me more pleased than to give out awards, commendations.

At times I even go on the floor of the House of Representatives and publicly laud them before our national constituency and there is reason why I should not hold this policy out to the Office for Civil Rights in the Department of Education. I'd be delighted.

Now, give me some reasons?

Mr. **Singleton**. Ready?

Mr. **Conyers**. Ready.

Mr. **Singleton**. OK. I'll write you a 1-minute speech if you want to give it, but——

Mr. **Conyers**. OK.

Mr. **Singleton**. We——

Mr. **Conyers**. I accept.

Mr. **Singleton**. We have eliminated, virtually eliminated a backlog of cases. When I say virtually it's because we don't know precisely. We're working on this. How many cases should be open at any given time. You see, a case comes in, you have to process it and so forth. So, we're working on some calculus to determine how many cases should be open at any given time with the number of filings we've received.

But, we feel right now that our pending caseload is pretty much keeping up with the filings, if you will. So, we virtually eliminated our backlog of cases.

We've reduced the average age of our complaints. Now, you know, the complaints that we had open at the end of fiscal year 1982 were over 1,227 days old.

The *Adams* order says we probably shouldn't have any case older than 225 days. We've reduced the average age. At the end of fiscal year 1984 it was 229 days.

Mr. **Conyers**. Very good.

Mr. **Singleton**. I thought it was fantastic. I'm very proud of OCR's staff because they're the ones who did the work.

I mean with adequate leadership, of course, but they did the work and I'm very proud of them. And, I think that some accolades are due them.

And, some other things that we have done are in the management area. We've got information systems that we've never had before. If you try and go back and look at statistics and figures for the Office for Civil Rights you can't pull them out. You can't find them. They didn't keep them. They had no recordkeeping systems that made any sense.

We've got those systems now. We've got improved management systems now, like the management by objective systems.

One of the things I found was that the Office for Civil Rights was reacting too much. Consequently, we did not have enough opportunity, it seemed to me, to do any planning, to plan our activities to see where we might want to go, where we might be going in the future.

So, through the management by objectives process I instituted a series of reforms that have resulted in a number of measures that require my senior officers to plan their activities and manage their resources in a much more effective manner. As a result, I think that probably all of them would agree that—although they may not like the MBO system per se—they have to admit that it does force them to plan and that's something that they've never done before in the Office for Civil Rights.

We are questioning a lot of the old theories, for example, that were relied upon in the survey area. We are asking questions. Never had we asked the question, well, why do we ask this particular survey question? Is this question giving us the information that we need? Is this a question even designed to give us what we need?

We've never evaluated those surveys before. We're doing that now. There are a number of systems like that that we put in analysis and are working on right now. So, it's a constant improving on our total operation.

I've realigned the office. We had a management organization, it seemed to me, that was bordering on chaos. There were no clear lines of communication. You had training being done in three different shops. You had survey information being collected by probably another two. There was too much overlap and no clear-cut lines of communication to the regional directors, who really do the bulk of the work in the field.

I cut through all of that. I reorganized the shop and, as a result, cleaned up those lines of communication. I think I have a much more streamlined, much more efficient organization, and I think the statistics show that.

We have—we've improved. We are processing cases faster and more effectively than we have ever before.

But, those are just a few of the reasons why I think that we ought to be praised for what we've done, and not be criticized as having not made any progress whatsoever. Now, that's not to say that we don't have any areas for improvement. Sure, we do. I know we do. And, we're working on that.

Mr. **Conyers**. Which areas would you——

Mr. **Singleton**. I knew you were going to ask that.

Well, the area that I think that we ought to improve upon is continuing to increase our efficiency in the processing of cases.

We have to continue to improve on that.

Another one—area I think that we can improve on is management. I mean, that was a word that was unheard of in OCR prior to my coming there. And, I have moved some people around as a result of their inability to manage.

Mr. **Conyers**. This is great. I'll have quite a set of remarks to make on the floor.

Mr. **Singleton**. I'll write them up for you. You won't have to worry about it.

Mr. **Conyers**. And, I probably will be able to get some of my colleagues to join me in the—well, this could not take minutes but maybe hours.

Now, included in that——

Mr. **Walker**. You know, Mr. Chairman, special orders are a specialty of mine, and we can probably get you an hour or two that would——

[Laughter.]

Mr. **Conyers**. Yes; I appreciate that very much. We might join forces on this.

Now, included in that preparation for these commendations we would probably want to include a few statistics. The descriptive prose is going to be great about improvement, efficiency.

Somewhere along the line we will probably have to use some numbers not mentioned here, which I'm sure you will supply, that will help us out in that regard.

Mr. **Singleton**. Sure. Be happy to.

Mr. **Conyers**. Well, now, that's just wonderful.

Now, why is it that the courts do not perceive this vast improvement? I mean, the court is creating an order that is supposed to help you improve. Do they have some difficulty in understanding through you and counsel this magnificent achievement that has been reported here?

Mr. **Singleton**. Well, you know, the court sits in judgment and they pass judgment on what we tell them and what the plaintiffs tell them. And, right now it's under advisement, and I think we will see whether or not——

Mr. **Conyers**. In other words, they, too, may understand in time that things are moving along better. Maybe so well that they may not even require to keep you under court order about these provisions, the reporting provisions?

Mr. **Singleton**. Yes, I think so. I would hope so.

Mr. **Conyers**. Tell me, what is onerous about these provisions that the court has asked you to——

Mr. **Singleton**. I'm glad you asked that question.

Mr. **Conyers**. Wait a minute. Let me finish it.

Tell me, what is it that is onerous about these provisions that the court has felt constrained to impose to improve your efficiency?

Mr. **Singleton**. Well, the first thing I'd like to talk about—and it's primarily the main thing—are the timeframes.

Mr. **Conyers**. I see.

Mr. SINGLETON. They're arbitrary. They're capricious. There was never any empirical evidence produced that stated that this was how long it should take.

It was pulled out of the air. The lawyers sat around the table and they said, well, you know, it should take them no more than 90 days to investigate. It shouldn't take them any more than another 90 days to negotiate and settle this thing.

But, it's totally unrealistic to the real world. Some of these people never managed an organization like this. They never dealt with the real problems. The people problems that you have to deal with, and also, they do not take into account the fact that the cases are becoming more complex.

When the black, handicapped, woman who is 70 years old files a complaint—we just hit four jurisdictional areas. It's different when you're just covering one jurisdiction—and our multijurisdictional basis, as far as complaints are concerned, are increasing.

Those complaints take time to go through all of those issues, and, you know, you've got an investigator who's working on the case and they're human. They go on vacation. They go on maternity leave, et cetera.

When they're gone, you know, you can bring somebody else on to pick up the pieces, but they spend most of their time spinning their wheels getting up to speed, getting to where their predecessor was that you lose some time.

A key witness may be unavailable for periods of time. I mean, there is just no empirical evidence upon which those timeframes are based.

Now, I will submit to you that if the *Adams* order were wiped out today and those arbitrary timeframes done away with, I'd impose my own. You have to have——

Mr. CONYERS. Would they be more severe?

Mr. SINGLETON. No, they wouldn't be more severe. They'd be more realistic.

Mr. CONYERS. Well, would they be more lenient?

Mr. SINGLETON. In some respects they would be. In some areas they may not be. It would depend upon the type of complaint that you're dealing with. The complexity of the case.

If the case is very complex, we may need more time to deal with it. But, the *Adams* order makes no distinction about complexity.

Mr. CONYERS. I thought I understood you to say that you were exceeding the timeframes, that you were——

Mr. SINGLETON. That's right.

Mr. CONYERS [continuing]. That you're moving faster than the requirements of the *Adams*——

Mr. SINGLETON. The previous administration had a worse record in compliance with the *Adams* timeframes. We are doing better.

But, I'll admit to you, we're not complying 100 percent with those timeframes. They're impossible to comply with on a 100-percent basis because they are arbitrary and capricious and they bear no relation whatsoever to the real world. None.

And, I think the plaintiffs in their heart of hearts know that we have improved our performance and we are complying—substantially complying with that order. I think if they felt otherwise they'd haul us back into court with a motion to show cause why we shouldn't be held in contempt, which they did once before.

Mr. **Conyers**. And, to what effect?

Mr. **Singleton**. I don't recall. I think it was thrown out or something, or there was some agreement that was reached. I think Mr. Lichtman probably could——

Mr. **Conyers**. Can't recall?

Mr. **Singleton**. But, that was before my time.

Mr. **Conyers**. Well, let me ask you this, sir.

Are you making every effort to comply with the *Adams* order?

Mr. **Singleton**. You bet. I think that—all you need to do is talk to some of my senior officers and my regional directors and they'll tell you the gray hairs they've gotten over the pressure that I put on them to comply.

Mr. **Conyers**. So, when you say the Department opposes the continued application of the *Adams* order you don't mean that you're not conforming under the order. You just don't like the decision that the court gave in the first place?

Mr. **Singleton**. Oh, yes, I mean, to do otherwise would be in contempt of the court. We——

Mr. **Conyers**. It could make you eligible to be in contempt of court.

Mr. **Singleton**. What I was trying to say was that we would be holding the order in contempt itself. I mean, you know, it's a contemptible order and we're just not going to follow it.

No; we follow the court order to the extent that we can. We don't like it, and we think it's unnecessary and arbitrary and capricious, but we try and do our best to follow it.

Mr. **Conyers**. Well, I think it's important that the Chair makes clear what you meant in your statement so that those kinds of circumstances that you describe will not come to pass.

It is evidence of the helpfulness of the acting chairman to make sure that it's understood that your opposition to the continued application of the *Adams* order is not that you refuse to comply with it, which would make you eligible for possible contempt.

Mr. **Singleton**. That's right.

No, no; we are trying to comply with it, but we don't like it. We think it's an unnecessary intrusion by the judiciary in the affairs of the executive branch.

Mr. **Conyers**. That's probably understandable. Maybe that this committee is intruding on the activities——

Mr. **Singleton**. Well, I'm glad you brought that up, too. I think that in recent days a lot of congressional oversight committees are infringing on the executive's prerogatives under the guise of oversight and it's something that I'd like to see the Justice Department take a look at.

But, I'm not suggesting that that's what's occurring here today. But, I do have some concerns about that.

Mr. **Conyers**. In what areas?

Mr. **Singleton**. Oh, across the board—foreign policy, defense——

Mr. **Conyers**. I see. In the Government Operations Committee?

Mr. **Singleton**. Maybe. I just think that as a student of Congress, of government, to see the kind of activity that takes place in Appropriations Committee hearings, oversight hearings, I think there is some overstepping of the boundaries. There is some blurring of the distinctions between the executive and the legislative branch under the guise of controlling the purse strings, of course.

But, that's just my theory. My concern.

Mr. **Conyers**. Well, it's the Congress that creates the departments in the first place.

Mr. **Singleton**. Well, maybe in a technical sense. But, the Constitution creates the three branches of Goverment, and——

Mr. **Conyers**. Well, but it's the Congress that passes the laws that describe the duties of the executive agencies.

Mr. **Singleton**. That's right. Then it's the job of the executive to carry out those duties and responsibilities. Once Congress has passed the laws, that's it.

Don't get in and try and——

Mr. **Conyers**. Oversight.

Mr. **Singleton** [continuing]. And try and do the job of the executive as well.

Mr. **Conyers**. OK.

Mr. **Singleton**. That's what I'm concerned about.

Mr. **Conyers**. Well, that philosophy is heard frequently, even inside of the Congress, not only inside of the executive branch.

Now, let me ask you about the court requirements in *Adams* that has to do with the requirement that you expand the staff. Do you recall that provision?

Mr. **Singleton**. No, I don't. That may have been before my time. I'm a new timer, more or less. Remember, this case goes back 15 years, so that may have been—that was clearly before my time when the order required an expansion of staff.

Mr. **Conyers**. Of course, you don't escape any requirements of the court order because you weren't there when it was given, do you.

Mr. **Singleton**. Oh, of course, not. I mean, to the extent that the particular order to which you are referring is valid. You have to understand that the recent decision by the appeals court threw the 1983 order out and we have gone back to the 1977 order as modified.

Mr. **Conyers**. Well, that touches you then?

Mr. **Singleton**. Yes.

Mr. **Conyers**. And, your responsibility is to comply with that order.

Mr. **Singleton**. Well, I'm not aware of——

Mr. **Conyers**. Would you like to consult with staff?

Mr. **Singleton**. Yes, I'm not aware of any requirement that's presently valid or presently operative in the *Adams* order that requires me to expand the staff.

The only orders that I may be aware of and I don't know that it's appropriate to call them orders, but at least concerns, would be from Appropriations Committees in terms of what our staff ceiling ought to be or what our staff floor ought to be.

Mr. **Conyers**. Well, do you remember anywhere in the operative court orders that the court found that the Office for Civil Rights had not done all that was possible to obtain additional staff and that there was some strong recommendation that the staff be increased?

Mr. **Singleton**. I am aware—generally—that there was some concern expressed about that and there was some direction given, but I wasn't aware that it came from the order itself. The more I think about it, I thought this was a direction that had come from Congress, again through the Appropriations Committee process.

But, I'm not aware of anything in the order that requires that.

Mr. **Conyers**. Do you remember the Senate Appropriations Committee instruction to the Office for Civil Rights with respect to a staff level?

Mr. **Singleton**. Yes. You mean, how long ago? The——

Mr. **Conyers**. About 1984 fiscal year.

Mr. **Singleton**. Yes.

Mr. **Conyers**. You recall that?

Mr. **Singleton**. Yes.

Mr. **Conyers**. And, in the parlance, may I ask, how are you doing?

Mr. **Singleton**. Well, our ceiling is set at 907 FTE. I think that that particular provision was just considered report language. That report wasn't incorporated and made a part of the bill.

So, I think it was the view of OMB or some such place that the Department would have to do what it could to maintain its planned staff and budget levels, and that staff level would have been unrealistic for OCR to attain because it would have meant some drastic reductions in staff levels of some other entities within the Department of Education.

Mr. **Conyers**. So, what's your staff level now?

Mr. **Singleton**. I think it's approximately 920 or so FTE.

Mr. **Conyers**. Do you need more staff?

Mr. **Singleton**. Oh, I have to get down. My ceiling is 907. I've got to get to 907 FTE by the end of the fiscal year. I think we'll make it without any problem relying on attrition.

Mr. **Conyers**. But, my question is do you need more staff?

Mr. **Singleton**. No; I don't think I need more staff. I think that I'm able to get the job done with the staff level that I have assigned.

I mean I look at—look at the significant achievements or accomplishments over the past couple of years and they were all done with staff levels of varying between 920 to 889 or so. So, I think that we can do it with the staff we have.

Mr. **Conyers**. You need more funding?

Mr. **Singleton**. Funding? No.

Mr. **Conyers**. Do you have too much funding?

Mr. **Singleton**. Yes.

Mr. **Conyers**. How much surplus do you have?

Mr. **Singleton**. I don't know what our present surplus is, but that I think will be taken care of the next time around. I think the President's request for the next fiscal year will put us right where we ought to be.

Mr. **Conyers**. Which is about where?

Mr. **Singleton**. It's about $43 million, $42 million.

Mr. **Conyers**. Have you had a surplus of funding in the past?

Mr. **Singleton**. Yes, we regularly rack up a—if I can use that phrase—a surplus.

Mr. **Conyers**. About how much?

Mr. SINGLETON. Oh, gee, it's hard for me to say. It varies. Maybe a few hundred thousand dollars to maybe a million.

I'm viewed as the Santa Claus in the Department of Education, but we're going to take care of that.

Mr. CONYERS. Well, how about—have you ever racked up several million?

Mr. SINGLETON. I don't know for a certainty. I'd have to consult with my staff to be able to tell you how much money we lapsed. I mean, what the exact figures were. It seems to me that at one point we may have lapsed a million or a million and a half. That was when there was a freeze imposed upon the Department and I could not hire new staff. So, consequently that meant that a lot of the funds that would have been used or utilized for salary and expenses were not.

My budget is very heavily salary and expenses. I don't make grants and contracts, so that $45, $44, $43 million is primarily salaries and expenses.

Mr. CONYERS. Is it ever as much as $5 million turned back?

Mr. SINGLETON. $5 million? I don't think so. I don't think so.

Mr. CONYERS. Well, now, would any of that money or any of those resources—could have been utilized to help you meet some of the *Adams* court requirements?

Mr. SINGLETON. No, I don't think that that's necessarily the case. We've had more staff in the past and weren't able to meet the *Adams*—the *Adams* order—timeframes. They are just unworkable. You just cannot physically——

Mr. CONYERS. You mean, even with more money and people it wouldn't help?

Mr. SINGLETON. I don't think so. I mean, all you have to do is look at the past history. Some of my predecessors had a couple of hundred more people than I have now and several million more dollars.

Mr. CONYERS. But, you're explaining to me that they weren't working efficiently. They hadn't heard of management goals——

Mr. SINGLETON. That's true.

Mr. CONYERS [continuing]. And objectives.

Mr. SINGLETON. That's true.

Mr. CONYERS. So, we don't want to compare apples and oranges.

Mr. SINGLETON. That's true, too.

Mr. CONYERS. I mean, with you—with your skills—streamlined management dispositions, would not you have been able to do more with more money and more personnel?

Mr. SINGLETON. No, Mr. Chairman, not even I would have been able to affect a greater compliance, I don't think, than we already have even with more money and staff.

Mr. CONYERS. Why not?

Mr. SINGLETON. Because the *Adams* order is so totally off the wall.

Mr. CONYERS. Why?

Mr. SINGLETON. Why? Because no one took the time to figure out how much time it really does take in the real world, in the real scheme of things to investigate complaints and compliance reviews.

Mr. **Conyers**. But, you and your lawyers were in court. You could have taken the time to provide the court with that information.

Mr. **Singleton**. We did, and the court rejected it.

Mr. **Conyers**. Well, what was it that you recommended that the court——

Mr. **Singleton**. I don't remember.

Mr. **Conyers**. You don't remember.

Mr. **Singleton**. That was so long ago.

Mr. **Conyers**. Could you help me find out what it was?

Mr. **Singleton**. Sure, if you would like me to provide that for the record, I will.

Mr. **Conyers**. Yes.

[The information follows:]

Congressman Conyers requested that I provide for the record the Department's proposals for modifying the Adams time frames (page 135 of the transcript). On August 16, 1982, in a declaration filed with the Court in the Adams proceeding, the Department proposed modifications to the time frames as contained in the December 29, 1977 Adams Order. I am enclosing a copy of this proposal at Tab B. More recently, on July 1, 1985, the Department filed a motion with the United States District Court for the District of Columbia to dismiss the Adams case. If the motion is granted, OCR would no longer be under the court-ordered time frames.

TAB B

PROVISIONS OF THE PROPOSED MODIFICATIONS TO THE ADAMS TIME FRAMES

Proposed by the Department of Education
in a Declaration Filed with the Court
on August 16, 1982

The Department proposed the following modifications to the time frames as contained in the December 29, 1977 Adams order:

COMPLAINTS

1. Complaints must be acknowledged within 15 days.
2. If the complaint is incomplete, information must be received within 120 days.
3. The Department shall resolve 75% of the complete complaints received within each fiscal quarter within 225 days of receipt of each complaint. The remaining 25% of the complete complaints received within the same fiscal quarter will be resolved within 510 days of receipt of each complaint. Resolution of a complaint means the Department shall: (1) close the complaint for administrative reasons or because no violation of the applicable laws was found; (2) obtain an agreement that the affected institution will implement an acceptable remedial plan for the areas of noncompliance; or (3) initiate enforcement action by commencing administrative proceedings or by other means authorized by law.

COMPLIANCE REVIEWS

For 75% of the compliance reviews initiated by OCR within each fiscal quarter, the Department shall determine, within 410 days of initiation of each compliance review, whether the affected institution is in compliance with the applicable laws with respect to the issues investigated during the review and shall have taken appropriate action. For the remaining 25% of the compliance reviews initiated by OCR within that same fiscal quarter, ED shall determine, within 560 days of initiation of each compliance review, whether the affected institution is in compliance with the applicable laws with respect to the issues investigated during the review and shall have taken appropriate action.

Mr. **Singleton**. I'll get a proposal that we submitted to the court. I guess it was in 1982. Maybe early——

Mr. **Walker**. If the chairman would yield for just a moment?

Mr. **Conyers**. I'd be delighted to.

Mr. **Walker**. I think it is perhaps interesting to point out at this juncture that we've got a little bit of empirical data put on the record in recent months and recent years by people like Drucker, who have pointed out that in large organizational management style, less is more in many instances. That, in fact, the reduction of headquarters personnel in large corporate offices and in large management schemes does produce more efficiency and does increase productivity and workloads. And—so, the very fact that numbers of people are reduced is not necessarily any indication at all that less work is being done. In fact, Drucker's thesis is that you may indeed end up with more productivity, and the Office for Civil Rights may well be an example of proving the Drucker thesis.

And, I thank you for yielding.

Mr. **Singleton**. A classic case in point.

Mr. **Conyers**. Wittingly or unwittingly.

Mr. **Singleton**. Wittingly or unwittingly? I mean, I don't know if I can respond to that.

Mr. **Conyers**. I mean, are you a Drucker protege or student. Do you follow the Drucker theory? Are you familiar with the Drucker——

Mr. **Singleton**. I am familiar with Drucker and I believe that many of Drucker's theories that he's posited in papers and so forth are valid. I wouldn't reject it as being totally fallacious and reject it out of hand.

At the time that I was trying to improve our management, I was not aware of this particular theory of Drucker's, but I think that it certainly does point out his thesis.

We were able to do more with less.

Mr. **Conyers**. I thank the gentleman from Pennsylvania.

Now, with reference to a *Dillon County School District No. 2 South Carolina* case that was observed in judge's chambers testimony here today, is that a case that rings any bells with you off hand?

Mr. **Singleton**. Generally it does, yes. I'm not particularly familiar with, you know, all the specifics of the case. It's an ability grouping case.

Mr. **Conyers**. Oh, boy, it goes on for pages here. The thrust of the testimony is that one of the most egregious examples of OCR's—pardon me, malfeasance in recent years is the Assistant Secretary for Civil Rights' refusal—that's you?

Mr. **Singleton**. Yes.

Mr. **Conyers** [continuing]. To take enforcement action against *Dillon County School District No. 2* despite having found the district in violation of title VI on three different occasions, beginning as long ago as 1977.

The elementary and secondary school districts of Dillon have historically operated under segregation and on the basis of a 1977 compliance review, OCR issued a letter of finding which determined *Dillon* not in compliance with title VI.

And, they quote you extensively.

Then in October 1979, OCR conducted a second title VI compliance review and still found them out of compliance.

On June 1980 the director of OCR region IV wrote the superintendent of Dillon and told him that they are going to forward their file to Washington for enforcement if they don't shape up.

And, then, in 1983 Assistant Secretary Harry Singleton wrote Dillon stating that a third title VI compliance review conducted that previous year found that there were still a number of racially identifiable classes and that they were still out of compliance.

And, then you wrote Assistant Attorney General William Bradford Reynolds requesting that the Department commence judicial proceedings. Eleven months later, in 1984, Assistant Attorney General Reynolds wrote Assistant Secretary Singleton stating, "We have concluded that no further action by this Department in this matter is warranted at this time."

And, that now we come to this hearing and I ask you what is the present disposition of that case?

Mr. SINGLETON. We are about to make a decision in that—in terms of whether to institute administrative enforcement action or not.

Mr. CONYERS. I see.

Well, that's swell.

Do you have any approximate idea of when roughly such a decision might come forward?

Mr. SINGLETON. No, I don't. It would just be a matter——

Mr. CONYERS. Could it be this year?

Mr. SINGLETON. Oh, yes, definitely this year.

Mr. CONYERS. OK.

Mr. SINGLETON. Definitely within the next 6 months.

Mr. CONYERS. Within 6 months?

Mr. SINGLETON. Yes.

Mr. CONYERS. Great.

Now, that wouldn't be the kind of example that we would go to the floor with in our process of praising the Department for its timely activity. Because there are cases of some complexity that sometimes preclude you from being able to move more swiftly than in others. Each case to turn on its own merit. And, there were probably, unknown to myself who is reading from the pages of the witness, there may have been extenuating circumstances.

Mr. SINGLETON. When did you say, Mr. Chairman, from the paper there that you're looking at that that case was started?

Mr. CONYERS. What year?

Mr. SINGLETON. Yes.

Mr. CONYERS. 1977.

Mr. SINGLETON. 1977?

Mr. CONYERS. Yes.

Mr. SINGLETON. Well, the way I would look at it is that I took that case to enforcement.

Mr. CONYERS. Yes.

Mr. SINGLETON. I sent it to enforcement. The Justice Department declined not to prosecute it. So, then, the judgment was then left to me as to what to do with it, and we are now contemplating that and I think in the very near future we'll make a decision as to whether or not it would be appropriate to institute administrative enforcement procedures to terminate funds in that particular case.

Mr. CONYERS. So, let's see, 1977 to—you say we can get it through with by 1985? Even before the end of the year?

Mr. SINGLETON. Yeah, well, that's true. I mean, there is no excuse. That's what I'm talking about. I mean, the previous administration sat on a lot of cases. I cleaned up a lot of stuff that they left over. There's no question about that.

I sent this case to enforcement and it was sent back, and I'm about to do something with it now. So, I—you know, I can understand, obviously, that concern that it took that long from 1977 to the present day for this thing to come to some final resolution.

But, I don't think, though, that the present leadership ought to be faulted. I think that we have moved in a responsible manner to deal with that particular case.

Mr. CONYERS. Yes. Now, you got the case last year?

Mr. SINGLETON. That's right. It's been around a while. I'll admit that fact. It's been around a while.

But, it was around a lot longer than that before I got it.

Mr. CONYERS. Yes, it started in 1977. But, let's see, you had it since May of 1984 and this is July of 1985 and you're assuring me that within 6 months from now you will be able to make that decision. Let's see, that's a year and 6 months on to July. That would be cutting it close—it will be tough to get it in before the end of this year.

Mr. SINGLETON. Well, you know, 6 months. I'm giving myself a little leeway. I may make the decision next week.

Mr. CONYERS. You could——

Mr. SINGLETON. I mean, you know—but, then again, it may not be. But, I——

Mr. CONYERS. So, it's going to take then from May 1984 to sometime this year, after the Attorney General sent the case back to you, to decide what to do.

Well, that's one case.

Mr. SINGLETON. Well, no, no, let's not stop there. I mean, that's exactly, that's one case.

But, there are a lot of things associated with that in terms——

Mr. CONYERS. It's probably a complex matter.

Mr. SINGLETON. Indeed it is. I mean, the whole issue of ability grouping and the standards that we were employing and so forth, and because of those, whether it is appropriate for us to terminate Federal financial assistance, which, Mr. Chairman—make no mistake about it—is a very, very heavy handed sanction. So heavy handed, in fact, that the previous administration never used it.

We've used it once so far, because the fact of the matter is that you hurt the very people that you're intending to protect when you terminate funds.

Mr. CONYERS. No question about it. We could not be in more close agreement, but——

Mr. SINGLETON. I'm very careful——

Mr. CONYERS. But—now, this committee, and especially myself, are not putting themselves in the position of recommending what action you take. The court, nor this committee, never suggest what resolution you should take—you are more sensitive and experienced in that matter clearly than we are.

The question now is why in God's name does it take so long to figure out what it is you're going to do. That's the question.

We're not looking for Draconian solutions or closing down schools or terminating funds. Obviously, the victims would be those who were the least culpable in the matter.

So, it's not a matter that we want to see schools' funds terminated as evidence that the Office for Civil Rights is on the ball. I don't get that message from even the most ardent civil rights advocates in the Congress.

Maybe there are some somewhere else that pressure you into this position, but I don't think that you will ever hear from Capitol Hill anyone advocating that, and, that's not to say that there aren't times when it might be fully required.

Mr. SINGLETON. That's right.

Mr. WEISS [presiding]. First, let me express my sincere appreciation to the distinguished gentleman from Michigan for assuming the Chair during my absence and for carrying on the hearings in such an outstanding manner.

Mr. Singleton, I understand that during the time that I was gone to testify on another matter in the Senate that you said that I had refused to meet with you. Well, let's put that in context.

On June 26, 1985, I forwarded a letter to you in which I said—I'm going to read the letter:

> Dear Mr. Singleton: The subcommittee requests immediate and unrestricted access to all investigative files of cases referred to the Department of Justice for enforcement or resulting in notices of opportunity for hearing. The listings of these cases were provided by OCR to the subcommittee on June 26. Subcommittee staff review of the files already available at OCR headquarters should begin immediately upon receipt of this letter. I remind you that the subcommittee has requested access to these files on several occasions starting on June 4, and that staff continues to be denied access to the files.
>
> In addition to the files concerning the aforementioned cases, the subcommittee requests access to all investigative files regarding the following school districts and institutions (case numbers are included where available).

We then list 15 such matters, and then the closing paragraph:

> If you foresee any further problems regarding access to the files, I would like to discuss them with you in my office at 4 p.m. on June 27. I am confident we can reach an agreement on this matter without unnecessary proceedings.

I invited you to meet with me. Indeed, I had subsequent occasion to telephone you. We did not get a response, and I was told that you were tied up in another meeting, and then subsequently we got—we called again and we were told that you had left on vacation.

So, let's put the record straight. We then had a conversation the day before yesterday in which you wanted to have a meeting, and I said at that point, "Let's go ahead with the hearing."

Now, one final thing—on the discussion that we had before I left. It is my understanding that in fact the Office for Civil Rights, when it refers matters to the Justice Department only refers occasional documents from the files on the cases on which it refers, that the files themselves are kept at the Office for Civil Rights.

Your testimony has been absolutely to the contrary. You said that the entire official file is forwarded to the Justice Department.

It is under their jurisdiction. That there may be some occasional rag-tag documents around in other people's offices.

I'm going to give you an opportunity to have your staff person, Ms. Battle, call her superior at this point so that in fact you can make a final statement for the record as to what the status of those files is. This is a very serious matter. I do not take it lightly and I hope you do not take it lightly.

Mr. SINGLETON. First of all, Mr. Chairman, let me respond that in response to your letter of June 26 I sent you a letter. And, in that letter I expressed my shock and surprise that you were maintaining that I was trying to deny access to files or documents of the Office for Civil Rights to this subcommittee.

I told you in that letter that our office, as far as I knew, as far as my staff was telling me, was working very diligently to collect the information for you.

In my letter, dated June 27, which was hand delivered to your office, I also expressed an interest in meeting with you and the ranking minority member to discuss appropriate procedures for dealing with open case files.

So, in addition to your request for the meeting on the 26th, I reiterated a need for us to get together.

Now, as far as the cases are concerned that have been forwarded to the Department of Justice, I stated to you that as far as I know, we do not keep those files in the Office for Civil Rights once they are referred to the Department of Justice.

You heard a member of my staff who would have knowledge of that from her day-to-day workings in the office that we do not keep those files in the office once we send them to the Department of Justice.

Now, if you're telling me that that's not good enough, that you want me now to send someone to the telephone, to call down to the office, to ask someone else if that is in fact not the case, then I will certainly be glad to do that.

But, I just want to be sure that that's precisely what you're asking?

Mr. WEISS. I am asking you to do that because my information is that the testimony you've given us is not accurate.

Mr. SINGLETON. Well, my testimony is as accurate as I can give it at this point, as far as my knowledge of this matter is concerned. I have no intention of lying to this committee, if that is what the Chair is implying. Nor do I have any interest or any stake to be gained by lying to this committee.

Certainly if we had those files I would turn them over. There is nothing to be hidden here. I cannot comply because I've been told we don't have the files. The custodian of the files is the Department of Justice, as far as I know.

Mr. WEISS. Well, just—again, we'll wait for the return of Ms. Battle to see what response we get.

Let me go on with some substantive questions.

Could you please describe early complaint resolution as it applies to the disposition of complaints of discrimination?

Mr. SINGLETON. The early complaint resolution procedure is a procedure that is employed to expedite the processing of cases, and hopefully, the resolution of cases. In that procedure individuals are given opportunity, that is to say, the representatives of the recipient and the complainant are given an opportunity, in an informal setting, to come up with a solution, work out a solution to their particular problem.

Now, this is all done before OCR conducts an investigation. We facilitate that meeting or bring together the parties. It's done with the eye toward giving the parties an opportunity to work out their differences in view of the fact that in many cases they have to resume a working relationship or some ongoing relationship, and this is one way that we can get results and minimize any friction that may exist.

Mr. Weiss. When was the early complaint resolution as a procedure adopted?

Mr. Singleton. The procedure was first started in a pilot project I believe in 1978 in a few regions. It was then formally—I believe it was applied in 1981.

Mr. Weiss. OK, so then it was started during the Carter administration. Is that correct?

Mr. Singleton. That's right. It began as a pilot project in June 1978, HEW.

Mr. Weiss. How many cases were settled by early complaint resolution between January 1, 1981, to March 31, 1985?

Mr. Singleton. I don't have that information. I can supply it for the record. I can tell you, though, that it looks like in fiscal year 1983 we had 127 cases that went through the ECR project, completed the ECR project, and we had a 56-percent success rate. That is to say, they were able to work out a settlement.

Mr. Weiss. Well, according to the list provided by OCR to the subcommittee, there were 312 cases that were settled between January 1, 1981, and March 31, 1985, by early complaint resolution.

You'd accept those figures as being accurate?

Mr. Singleton. Yes, if that's what you have——

Mr. Weiss. During the same time period, I understand, that there were 1,600 violations of law found after an investigation. Would you agree with that figure?

Mr. Singleton. Well, if that's the—if that figure was supplied to you by my office, and that's what you're reading from, then, yes, I would agree with it.

Mr. Weiss. Yes, we got that from your office, as well.

I gather that early complaint resolution was first attempted in those cases not involving systemic issues before an investigation was conducted. Is that correct?

Mr. Singleton. That's correct.

Mr. Weiss. OK. OCR's 1984 annual operating plan stated that these early complaint resolutions "Insure that complainants' rights are protected fully and that the settlements are consistent with regulatory requirements."

Is that true? Have all the settlements been made according to the law and your regulatory requirements?

Mr. Singleton. Well, I think that as part of the ECR process the parties are—sat down and are informed of what the law and the regulations require and that any settlement that they reach should be in compliance or conformance with those laws and regulations.

Mr. **Weiss**. OK. On December 13, 1983, you received a memorandum from the director of your quality assurance staff. In reference to the statement in the annual operating plan that settlements are in accord with regulations, the memorandum states that, "Existing internal procedures do not support this statement."

The memorandum noted that OCR does not take a position on the merits of the complaint and it does not sign the resolution agreement.

What action did you take in response to this memorandum which questioned the legal validity of the early complaint resolutions?

Mr. **Singleton**. I set up a task force to take a look at the ECR process to totally evaluate it, to see whether or not it is a valid claim, among other things, and also whether or not it is something that we could continue to participate in.

Mr. **Weiss**. When did you set up that task force?

Mr. **Singleton**. Oh, I don't know the exact date. I think it may have been April of this year.

Mr. **Weiss**. So, you received that memo on December 13, 1983, and you set up the task force in April of 1985?

Mr. **Singleton**. Well, the task force—yes, the task force was not set up in any direct response to that particular memo. In fact, I don't even recall the particular memo that you're talking about, but, yes, a task force was set up, was established, and it is——

Mr. **Weiss**. Do you deny that in fact you received such a memo from——

Mr. **Singleton**. I don't deny anything——

Mr. **Weiss** [continuing]. From the director?

Mr. **Singleton**. Mr. Chairman. I do not deny anything. I just say that I do not recall that particular memo.

Mr. **Weiss**. You do not recall——

Mr. **Singleton**. I get many memos, Mr. Chairman. Many memos.

Mr. **Weiss**. Thank you, Mr. Singleton. You're telling us that you do not recall a memorandum that you received from the Director of your quality assurance staff which said that the OCR's 1984 annual operating plan statement, that the—these early complaint resolutions——

Mr. **Singleton**. I don't remember that memo.

Mr. **Weiss**. You do not recall that memo at all?

Mr. **Singleton**. I don't recall that memo.

Mr. **Weiss**. OK.

On November 13, 1981, the Department of Justice's Civil Rights Division sent a letter to OCR regarding early complaint resolution. That letter raised several concerns, including:

> That the ECR [the early complaint resolution] guidelines do not require that the agreements reached between a complainant and the recipient meet the legal standards set by title VI, title IX, section 504, and your implementing regulations. The apparent willingness of OCR to accept any agreement which results in a withdrawn complaint, regardless of the substance of that agreement, could lead to a weakening of your enforcement posture and our litigation position when dealing with a different recipient in a similar factual situation.

Do you remember receiving that Justice Department Civil Rights Division letter to OCR regarding your early complaint resolution?

Mr. **Singleton**. No, I did not come to OCR until approximately April of 1982. That memo predated me. I did not know of its exist-

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ence until in fact it was produced pursuant to a request made by this subcommittee.

My staff didn't even know, as far as I know, that that memo existed until you identified it in one of your document requests.

Mr. **Weiss**. Who was in charge of the office prior to April of 1982?

Mr. **Singleton**. Clarence Thomas, the current Chairman of the Equal Employment Opportunity Commission.

Mr. **Weiss**. And, there was no record in your files at all of this Department of Justice statement?

Mr. **Singleton**. There had to be a record of that in our files because we were able to find it when you asked for it in your production of documents.

But, I was not aware of that memo. No one had ever brought it to my attention.

Mr. **Weiss**. Who's responsibility do you think it was to apprise you of the existence of that memo or that letter?

Mr. **Singleton**. Well, it would have been the responsibility of the various staff people that had responsibility for coordinating our enforcement program. Primarily, I would have been looking to the Deputy Assistant Secretary to bring something like that to my attention.

Mr. **Weiss**. Who is in charge of the early complaint resolution program in your office?

Mr. **Singleton**. Well, there is no one specifically in charge of the early complaint resolution program.

Each regional director is responsible for the ECR process, if you will. The ECR Program takes place in the regions and it's the regional director's responsibility to implement, institute that particular program.

Mr. **Weiss**. But, this was a letter sent to your office, Director of Planning and Compliance Operations Service, Office for Civil Rights, U.S. Department of Education, Washington, DC.

Mr. **Singleton**. Yes.

Mr. **Weiss**. Do you think you should have known about the existence of that letter?

Mr. **Singleton**. Oh, I think I should have; yes.

Mr. **Weiss**. How does OCR monitor the early complaint resolution settlements to ensure that the rights of the complainant are protected?

Mr. **Singleton**. Well, I think that—I'm not certain of this. I'd have to discuss it with my staff, but I believe that they do this through the quality assurance process——

Mr. **Weiss**. Can you——

Mr. **Singleton** [continuing]. In the regions.

Mr. **Weiss**. Can you assure this subcommittee that every one of those settlements are legally valid and will not jeopardize any future litigation pursued by the Department of Justice?

Mr. **Singleton**. Can I assure this committee of that?

Mr. **Weiss**. Yes.

Mr. **Singleton**. No, I can't assure this committee of that. I can't assure this committee of something like that; no.

Mr. **Weiss**. So, that here you refer 22 or 23 cases on to the Department of Justice for action by them. In the meantime you have

312 cases dating back to before you got there, but according to your testimony, over 100 cases in the past year were settled by early complaint resolution, but you can't assure the subcommittee that every one of those settlements are legally valid and will not jeopardize any future litigation pursued by the Department of Justice. That's what you're telling us; right?

Mr. SINGLETON. I'm telling you that I cannot justify those—every one of those cases without seeing those cases or having any input on them; no.

Mr. WEISS. Do you believe that in fact settlement of early complaint resolutions ought to be done in such a manner that they do not either jeopardize any future litigation pursued by the Department of Justice or that they are in fact legally valid?

Mr. SINGLETON. I do and that's why the task force has been set up.

But, understand, any case referred to the Department of Justice by us was not an ECR case.

Mr. WEISS. Say it again.

Mr. SINGLETON. Any case referred to the Department of Justice is not an ECR case. ECR is a method by which we settle cases. We wouldn't be—you know, sending a case like that to the Department of Justice.

Mr. WEISS. Yes, but what the Justice Department was saying to you is that your procedures, which may be legally invalid in the early complaint resolution process, may in fact jeopardize cases which are not resolved with the early complaint resolution process, but which are then forwarded to Justice for its enforcement process.

Do you understand that?

Mr. SINGLETON. No, I don't know that that's in fact what they're saying at all. I mean, that may not be their intent at all. That's your interpretation of it.

There may be other interpretations of that language, Mr. Chairman, and I don't submit that yours is the only one.

Mr. WEISS. For someone who has not been familiar with it you now are reinterpreting what the Justice Department said. It seems to me that what they said is very clear. They say, I'm quoting: "The apparent willingness of OCR to accept any agreement which results in a withdrawn complaint, regardless of the substance of that agreement, could lead to a weakening of your enforcement posture and our litigation position when dealing with a different recipient in a similar factual situation."

I don't see where that leaves very much room for interpretation at all.

Mr. SINGLETON. Fine.

Mr. WEISS. Again, could you describe OCR's program for monitoring settlements reached as a result of enforcement or investigation?

Mr. SINGLETON. Once the settlement is reached, the regional office will set up a monitoring program and periodically review the results of the settlement agreement that was reached.

Mr. WEISS. How many settlements were monitored during the last year?

Mr. **Singleton**. I *don't know. I view monitoring of* settlements as a discretionary activity.

Mr. **Weiss**. Would you for the record submit to this subcommittee how many settlements were monitored during the last year?

Mr. **Singleton**. I will check our records and, to the extent that we have that information, we'll provide it.

Mr. **Weiss**. Thank you.

[The information follows:]

You asked me to provide information on OCR's monitoring activities during the last year. I indicated that I would provide this information for the record to the extent that we had that information (pages 157 and 158 of the transcript). My regional directors' performance agreements for the period of July 1, 1984 through June 30, 1985 required the regions to monitor remedial plans obtained as settlements in complaints and compliance reviews. I am enclosing a summary of this information submitted pursuant to the performance agreements at Tab A.

SUMMARY OF REGIONAL REPORTS ON THE MONITORING OF REMEDIAL PLANS OBTAINED AS SETTLEMENTS IN COMPLAINTS AND COMPLIANCE REVIEWS

Region	Number of Cases Monitored
I	24
II	67
III	57
IV	174
V	74
VI	86
VII	27
VIII	28
IX	5
X	14

Mr. **Weiss**. How much on-site monitoring does OCR conduct?

Mr. **Singleton**. I don't quite understand the chairman's question, how much. What do you mean?

Mr. **Weiss**. How many site monitoring events does your office undertake?

Mr. **Singleton**. I don't know. Again, I'd have to provide that for the record to the extent that we had that information.

Mr. **Weiss**. Well, would you try to pull it together and submit it to the subcommittee, please?

Mr. **Singleton**. I will.

Mr. **Weiss**. Thank you.

On June 24, 1984, you informed OCR senior staff that "OMB have disapproved the Department's initial request for additional positions for OCR. If, however, the positions are allocated in the future, I want to ensure that OCR is ready to conduct a vigorous monitoring program."

Now, were you saying in that statement to your OCR senior staff that because of an insufficient number of positions that you are not in fact able to conduct a vigorous monitoring program?

Mr. **Singleton**. What I was saying to my staff was if we get additional staff people we were going to assign them specifically to doing monitoring activities, to increase our monitoring activity, our monitoring program.

Mr. **Weiss**. OK. OCR, as I understand it, has not received additional staff since that memorandum was written. Have you been able to conduct a vigorous monitoring program?

Mr. **Singleton**. Well, it depends on your definition of "vigorous." We do monitoring with the staff that we have, with the resources that are available to us after we take care of mandatory obligations. Monitoring is not a mandatory obligation.

Mr. **Weiss**. Well, are you doing a more vigorous monitoring program than you were doing as of June 24, 1984, when you made this direct statement to your senior staff?

Mr. **Singleton**. I'm not in a position to be able to characterize it one way or the other. We are monitoring.

Mr. **Weiss**. In 1984 OCR prepared draft monitoring guidelines. Were the guidelines ever published?

Mr. **Singleton**. I don't recall.

Mr. **Weiss**. Did OCR use the quality assurance program to monitor settlements and investigations? You had indicated that that quality assurance program was being used to monitor the early complaint resolution.

Mr. **Singleton**. Yes, that's what our quality assurance program is used for.

Mr. **Weiss**. Has the director and staff of the quality assurance program now been detailed to other positions?

Mr. **Singleton**. That's correct.

Mr. **Weiss**. When was that done?

Mr. **Singleton**. At headquarters. It was done several months ago, in response to staff needs elsewhere, yes.

Mr. **Weiss**. And who is doing the quality assurance work currently?

Mr. **Singleton**. The regional offices are.

Mr. **Weiss**. So that if the quality assurance program was doing the monitoring previously, and they've been given other work, then there's nobody at headquarters now who's doing monitoring, is that correct?

Mr. **Singleton**. The monitoring is being done in the regions, at the regional level. There is no headquarters superview, if you will, superimposed on that, no.

Mr. **Weiss**. Was quality assurance doing monitoring from headquarters before it was disbanded, or detailed to other positions?

Mr. **Singleton**. Yes, that's right. Another layer, yes.

Mr. **Weiss**. On February 12, 1979, the Office for Civil Rights received a complaint against the DeKalb County, GA, school system from the parents of disabled students, charging that the students' rights under section 504 had been violated by the State's hearing system, which did not provide adequate due process for students seeking reimbursement from local education agencies for special schooling.

An investigation by OCR determined that not only had the students' rights been violated, but the hearing process in Georgia was in conflict with Federal law and did not provide the rights provided handicapped students under section 504.

OCR concluded that the parents of the student should be reimbursed for the cost of the special private school he had attended. According to OCR investigative case files, this case was referred to headquarters by region IV in June 1981, but the file was misplaced and the case languished until early 1984.

Can you explain how such a delay can happen?

Mr. **Singleton**. No, I can't.

Mr. **Weiss**. Eventually OCR decided that "Until the recipients agree to reimburse the complainants for those costs, they," meaning Georgia, "remain in violation of section 504 and its implementing regulations."

On March 9, 1984, the Department of Education issued a notice of opportunity for hearings before an administrative law judge to the DeKalb school system. Mr. Singleton, what is the purpose of bringing such a matter to a hearing before an administrative law judge?

Mr. **Singleton**. For the purpose of making a determination as to whether or not it would be appropriate to terminate the Federal financial assistance going to the recipient.

Mr. **Weiss**. So in the case of DeKalb County, OCR would have determined that the school was in violation of the law and had refused to remedy the violation, is that correct?

Mr. **Singleton**. Yes; that's correct.

Mr. **Weiss**. Issuing a notice of opportunity for hearing is not done lightly, I understand. It is normally used as a last resort when all other attempts to resolve a case are exhausted. Is that correct?

Mr. **Singleton**. Under the law we are required to make sure that we have exhausted all attempts at voluntary compliance.

Mr. **Weiss**. Right. The hearing notice in the *DeKalb* case stated that "So long as Respondent School District refuses to reimburse the student's parents for costs incurred as a result of this procedural violation, it continues to be in violation of section 504."

After the hearing notice was issued, the DeKalb School District filed suit against the parents of the disabled student. Notes in the OCR case file indicate that OCR considered this lawsuit an attempt to intimidate the parents, and OCR considered including a retaliation intimidation allegation in the hearing notice.

Do you have any reason to dispute these facts?

Mr. SINGLETON. No.

Mr. WEISS. On March 25, 1985, OCR asked the administrative law judge to dismiss the case. Why, Mr. Singleton, after nearly 6 years of investigation and legal work, did OCR suddenly ask the administrative law judge to dismiss the case?

Mr. SINGLETON. All of the elements in the case had been dealt with, with the exception of one, and that was reimbursing the parents at the time when I made the order. And I made the order to dismiss the case, make no mistake about that.

I was under the impression that those parents had insurance that would compensate them for those out-of-pocket costs. But in any event, even if they did not get that, in my judgment the school district had provided the prospective relief, in my judgment, that was important here to ensure that there would be no further violation of Federal law.

The retaliatory lawsuit, the harassing lawsuit, was to be dismissed, and in my judgment that was sufficient to close this case. I was not about to terminate millions of dollars' worth of Federal financial assistance to this particular school district and harm those handicapped children down there who benefit from that assistance because these parents were out of pocket a couple of thousand dollars.

It was a judgment call, and I made that judgment.

Mr. WEISS. OK. The settlement reached between OCR and DeKalb contained three agreements: One, the district agreed to abide by the State administrative due process procedures. But hadn't the district already agreed to abide by those procedures before the hearing notice?

Mr. SINGLETON. I don't know for a certainty whether that's in fact the case or not, but even if they had it wouldn't have changed anything.

Mr. WEISS. OK. The second agreement was that the district will not violate the procedural safeguards of section 504. Hadn't the district already agreed to do that prior to the issuance of the hearing notice?

Mr. SINGLETON. Again, I don't know that specifically to be the case, but even if they had it wouldn't have made any difference.

Mr. WEISS. OK. The third agreement was that DeKalb would dismiss its suit filed against the parents of the disabled student, and that's the same suit that the OCR had considered a retaliatory action that would not have been filed had OCR not issued a notice of opportunity for hearing, correct?

Mr. SINGLETON. Yes.

Mr. WEISS. OK. OCR investigative files clearly demonstrate that the heart of the case was the district's refusal to reimburse the parents, and that without such reimbursal the district would remain in violation of section 504. The district did not reimburse the parents.

In fact, the district agreed to do nothing more than it would have already done had OCR not intervened in this case at all. Why did OCR not continue to seek reimbursement for the parents in this case?

Mr. SINGLETON. I just told you. I was not about to terminate Federal financial assistance to that school district because these parents were out of pocket a couple of thousand dollars. That's going after a gnat with a cannon, Mr. Chairman, and in my judgment the relief that had been granted by the—provided by the recipients was enough to assure me that Federal financial assistance would not be used in a discriminatory manner in the future, and that any retaliatory harassment, harassing lawsuits, brought by these people, would be wiped away.

The only issue remaining was the money, and the school was adamant about that. And I was not about to terminate their Federal funds and harm the very people that we are charged with protecting the rights of because these parents were out a couple of thousand dollars.

Mr. WEISS. That's swell. But how are you protecting the rights of anybody in a case history such as that? What kind of signal do you think that you're sending to people who think that they've got complaints of discrimination against the school or the school system?

Do you think that——

Mr. SINGLETON. Yes; I think that we did an excellent job in that case, Mr. Chairman, and I tell you what, I think that you're nitpicking. You take that particular case and you point out that particular instance, you would have us terminate Federal financial assistance and harm all those handicapped kids because these parents were out a few thousand dollars?

We've already taken care of the issue of discriminatory conduct on the part of the school district——

Mr. WEISS. Tell me whether you——

Mr. SINGLETON [continuing]. That they are going to stay away from that kind of conduct in the future. They have eliminated their lawsuit that was harassing these individuals. The only element remaining was the reimbursement of some funds to these people.

But you are suggesting that I should have terminated the Federal financial assistance here and made those handicapped kids go without the services that they provide just to prove a point?

Mr. WEISS. No, sir. I'm suggesting that you enforce and implement the laws that the Congress of the United States passed and which the President of the United States signed.

Mr. SINGLETON. Well, Mr. Chairman, if you're implying that I'm not enforcing them then you know what to do.

Mr. WEISS. That's what I'm implying, my friend.

Mr. SINGLETON. And you know what to do, my friend.

Mr. WEISS. Have you now received some information about the question which I asked you to have checked by telephone regarding the Justice Department referrals?

Mr. SINGLETON. Yes. Ms. Battle will relay that information to you.

Mr. WEISS. Ms. Battle? You're still under oath.

Ms. **Battle**. Yes; the normal practice for the Office for Civil Rights when cases are referred to the Department of Justice is to refer the entire case file. The cases that are listed on your list for 1983 were all transition cases—the term that we use—I guess it came up under the *Adams* order, I'm not sure.

Those cases had to be referred to the Department of Justice on an expedited basis. Checking with my office, I am not sure whether all of the files for those cases were referred to the Department of Justice at the time when we transferred all those cases.

What we will do is go back to my office and look through the files, collect all the files, and I think that we will send it to you as soon as we make that search.

Mr. **Weiss**. Now let me see if I understand that correctly. First of all, whom did you speak with?

Ms. **Battle**. My immediate supervisor, Mr. Krueger, was out to lunch.

Mr. **Weiss**. Yes?

Ms. **Battle**. I spoke to his supervisor.

Mr. **Weiss**. Whose name is——

Ms. **Battle**. Fred Cioffi.

Mr. **Weiss**. Fred Cioffi?

Ms. **Battle**. Fred Cioffi.

Mr. **Weiss**. And let me see if I understand what you said. You're saying that because these cases were transitional cases under the *Adams* rule, that in fact the total files were not forwarded to the Justice Department and that those files or copies thereof in fact exist in your Office for Civil Rights?

Is that what you're saying?

Ms. **Battle**. I don't think that's what I said.

Mr. **Weiss**. Tell me what you said, then.

Ms. **Battle**. I said the transition cases were a whole slew of cases that were sent to the Justice Department on an expedited basis. We were trying to comply with a court order. I cannot say at this point after talking to Mr. Cioffi whether all those files at the time we transferred the cases to the Department of Justice were copied and sent to the Department of Justice.

He has committed that we will go through the files and try to confirm that fact, and also transfer to you for your review copies of those files that exist in the Office for Civil Rights, if they exist.

Mr. **Weiss**. Yes; and that was not done prior to this morning's hearings, is that what you're saying, that that kind of check had not been done prior to today's hearing?

Ms. **Battle**. Prior to today's hearing we were operating under the normal practice of OCR, and under the normal practice they would have all been transferred to the Department of Justice.

Mr. **Weiss**. So you assumed that the normal procedure was followed.

Ms. **Battle**. Yes; I did. Yes.

Mr. **Weiss**. But in fact in this instance the normal procedure was not followed.

Ms. **Battle**. I am not sure that the normal procedure was not followed. I'm saying I'm not sure that it was and I will——

Mr. **Weiss**. Thank you. But you've just learned that in the course of this telephone conversation, is that correct?

Ms. **Battle**. I just learned in the course of the telephone conversation because of the question that you raised that possibly there may be some validity to your statement, and therefore we will check on it. I have no idea whether normal office practice was followed or not.

Mr. **Weiss**. Thank you.

Mr. Singleton, I would very much appreciate your directing a very thorough search to be undertaken in your office as to the location of those files in your office and let our staff have access to those as quickly as possible.

Mr. **Singleton**. Mr. Chairman, I will commit to you that we will go back and we will search the files to the extent that we have any of those files in our office. We will be more than happy to make them available—be more than happy to make them available to the committee.

Mr. **Weiss**. It would have been nice before you came here with all the assurance that you gave to us that in fact you had done that checking.

When are we going to see those files?

Mr. **Singleton**. As soon as possible.

Mr. **Weiss**. Today is Thursday. We had spoken about—today is Thursday, and we've spoken about having you pursue this matter over the weekend. My staff, subcommittee staff, will be visiting with you on Monday.

Mr. **Singleton**. No; Let's make this very clear, Mr. Chairman, because there seems to be a tendency here to blur what it is we're talking about. What I said that I would take under advisement is getting any completed files, any files, complete files, at the Department of Justice, copying those or whatever you want to do and give those to you.

That's what I'm taking under advisement. If I have any files in the Office for Civil Rights that relate to these particular cases, we will make those available to you.

Mr. **Weiss**. Immediately?

Mr. **Singleton**. As soon as possible.

Mr. **Weiss**. Thank you.

Mr. **Singleton**. Mr. Chairman, if you intend to go on much longer I would respectfully request a few minutes' recess here.

Mr. **Weiss**. As a matter of fact, Mr. Singleton, I think that probably what we will do at this point is to terminate your testimony and we will before the recess, at the end of this month, have occasion to resume these hearings so that we can pursue some further questions relating perhaps to some additional material which the staff will have been able to look at in the interim.

Mr. **Singleton**. Thank you.

Mr. **Weiss**. And again I thank you very much for your participation and we look forward to your responses.

Mr. **Singleton**. Thank you.

Mr. **Weiss**. The next witness for this morning is Mr. Antonio J. Califa, former Director for Policy and Enforcement Service, Office for Civil Rights.

Mr. Califa, before you start your testimony will you stand and raise your right hand?

[Witness sworn.]

Mr. **Weiss**. I understand that you have no prepared comments. You're available for whatever questions we may have. If you care to make some opening comments you may do so at this point.

STATEMENT OF ANTONIO J. CALIFA, FORMER DIRECTOR FOR POLICY AND ENFORCEMENT SERVICE, OFFICE FOR CIVIL RIGHTS

Mr. **Califa**. I don't care to.

Mr. **Weiss**. OK.

I understand that you are leaving the Office for Civil Rights within the next day or two, and that you're assuming a position with the American Civil Liberties Union, is that correct?

Mr. **Califa**. That's correct, Mr. Chairman. The parole board met and decided that it was time for me to leave.

Mr. **Weiss**. Pull the microphone a little bit closer to you.

Describe what your position has been, how long you've been with the agency, what kind of work you've been doing and what your most recent position has been.

Mr. **Califa**. I began with the agency in September of 1978 when I was a Branch Chief in the Office of General Counsel. I then became the Associate Deputy Director for Policy in HEW/OCR, then the Deputy Director for Policy in HEW/OCR. At the time of the passage of the Department of Education Organization Act and when the two Departments were divided in May of 1980, I became a Deputy Assistant Secretary in OCR, Department of Education.

And my function since May of 1980 until November 9, 1984, was to be the head of policy and enforcement and litigation portion of OCR headquarters.

Mr. **Weiss**. What are the responsibilities of the Policy and Enforcement Service?

Mr. **Califa**. The responsibilities include the running—initiating and running of administrative litigation, developing and initiating policy, advising the Assistant Secretary, the Secretary and other Department officials of the applicable civil rights laws.

Mr. **Weiss**. Now, were you at all familiar with the referral of the 22 or 23 cases pursuant to the *Adams* decision to the Department of Justice for enforcement?

Mr. **Califa**. Yes, sir, I was.

Mr. **Weiss**. And are you familiar with the process involved in forwarding those particular files to the Department of Justice? What was forwarded and what was kept in the office?

Mr. **Califa**. Yes, sir, I am.

Mr. **Weiss**. Please tell us for the record.

Mr. **Califa**. It was always my impression that we never sent the original file to the Department of Justice. At approximately 10 minutes to 12, I called Mr. Frank Krueger, who Harry Singleton had said was the appropriate official in charge of these matters, and checked my recollection without telling him for what purpose I would use that information.

And he assured me that we never sent the original files to the Department of Justice.

Mr. **Weiss**. You send copies, is that the implication?

Mr. **Califa**. The statement he made to me was that copies were sent and there were only copies of the letter of findings and perhaps a small portion of the file, like the investigative report. So not even the entire file was copied, according to Mr. Krueger in his conversation with me.

Mr. **Weiss**. You heard Mr. Singleton's testimony in regard to that matter. Is he in the chain at all of forwarding matters to the Department of Justice? Does he sign off on matters which are sent over to the Department of Justice?

Mr. **Califa**. Well, no, he wouldn't be involved in the actual sending over of the documents that were sent over. He would approve of them being sent over, but he would never have seen the——

Mr. **Weiss**. What was actually in the files that were sent over.

Mr. **Califa**. That's correct.

Mr. **Weiss**. Thank you.

After 4 years as the Director of the Policy and Enforcement Service. I assume that you're familiar with the legal standards applied in enforcement action, is that correct?

Mr. **Califa**. That's correct.

Mr. **Weiss**. Would you tell us what the Bakersfield plan is?

Mr. **Califa**. The Bakersfield plan as we refer to it in the Office for Civil Rights now involves a remedy for an elementary and secondary school district that had been segregated, and that we were trying to integrate. The Bakersfield plan involved a case that we referred to Justice in January of 1981.

They negotiated a plan with the district, and settled the case. The case was—the remedy was entered in a consent decree in a Federal court. The plan involved four basic components: a voluntary minority-to-majority transfer of students, that is, if a black student wanted to attend a predominantly white school he or she could do that.

Five full magnet programs that were academic magnet programs, and by magnet we mean making a school a focus of a particular type of learning that would make that school attractive to students of another race. Something called mini-magnets was the third part of the plan, and that involves having students visit minority schools, white students visit minority schools at periodic intervals.

And the fourth element that I recall was compensatory education for minority children.

Mr. **Weiss**. In school assignment cases, does OCR use the Bakersfield plan as a guidepost in determining the adequacy of school system desegregation plans?

Mr. **Califa**. Yes, sir. Harry Singleton stated that Bakersfield would be our guiding light in this area.

Mr. **Weiss**. In 1984 OCR found that student and faculty assignment practices of the Peoria, IL, schools resulted in racial isolation, a violation of title VI. After OCR took the matter before an administrative law judge, it then accepted a voluntary settlement plan. Why did you oppose this plan?

Mr. **Califa**. Well, I opposed the plan because it didn't meet the Bakersfield standard. It didn't meet the Bakersfield standard in that there was no voluntary minority-to-majority transfer policy. There was no real magnet program. Instead of five full magnets that we had in Bakersfield, we had one magnet school which was a latchkey magnet.

Latchkey magnet is a fancy term for extended school day, or babysitting, and there was no compensatory education for the minority students. It just did not meet the Bakersfield standard.

Mr. WEISS. OK. Did the Policy and Enforcement Service recommend that the Peoria settlement be toughened?

Mr. CALIFA. Yes, Mr. Chairman.

Mr. WEISS. And was your recommendation accepted?

Mr. CALIFA. No; it was not.

Mr. WEISS. Are OCR policies on desegregation, based on what you have seen, adequate for addressing violations of title VI?

Mr. CALIFA. Not in this instance. Certainly not.

Mr. WEISS. When the Department of Justice declines to take any action in cases referred to it by the OCR, does that mean that the violation found by OCR no longer exists?

Mr. CALIFA. No; it does not.

Mr. WEISS. What should OCR do about violations it finds when the Justice Department refuses to take action?

Mr. CALIFA. In the vast majority of cases that the Department of Justice refuses to take action in, when they're turned back to OCR, OCR should initiate an administrative enforcement action. The only time I could see that not being appropriate would be, for example, if when Harry sent a referral over to Brad Reynolds and Brad Reynolds wrote back saying "Harry, you didn't hear about the case of *Smith* v. *Jones*. It was decided yesterday in the Supreme Court. It's on all fours with what you sent over and you don't have a case."

In a situation like that, that is, new law, or new evidence, the Assistant Secretary would then appropriately not initiate an enforcement action. In any case, he should withdraw the letter of findings that was initially sent out.

Mr. WEISS. Where that kind of situation does not prevail, that is, there's not a new court decision which in fact declares that there's no case in essence, what has been the practice at OCR when the Justice Department refuses to litigate?

Mr. CALIFA. Well, the practice has been totally bewildered and confused. We thought there was a—the practice has been that although there was a violation on Monday when we sent it over, now on Tuesday they—DOJ-Justice—say that they're not going to handle it. It's Wednesday, the case has been returned to us, and we don't know what to do.

That's what happened with *Dillon*, the *Dillon* case. DOJ sent it back, and all of a sudden a case that had been a violation was something to be considered and thought over and reexamined from the very start.

Mr. WEISS. OCR, I understand, is required by the *Adams* order to take enforcement action within certain deadlines when violations of laws are found. That's correct, isn't it?

Mr. CALIFA. Yes, sir.

Mr. WEISS. All right. OCR has often met these deadlines by referring a number of cases to the Department of Justice as the deadline was about to expire, is that correct?

Mr. **Califa**. Well, there was certainly heightened activity as deadlines approached in *Adams*, yes, sir.

Mr. **Weiss**. Did Mr. Singleton ever tell you that he believed OCR's responsibilities under the *Adams* order end when cases are referred to the Department of Justice?

Mr. **Califa**. He told me that often. He may have said that to you today, and he is quoted in today's Washington Post as having said in a deposition "Once a case is referred to Justice for action, that's their responsibility." That's today's Post.

Mr. **Weiss**. Have you been able to find support for that proposition of his?

Mr. **Califa**. No; I have not.

Mr. **Weiss**. But he clearly indicated to you that he did not believe that OCR should have responsibility in cases where violations of law are found once those cases are referred to the Department of Justice, right?

Mr. **Califa**. Once they're referred to the Department of Justice, he indicated to me he washed his hands of them.

Mr. **Weiss**. Tell us what ability grouping is.

Mr. **Califa**. Ability grouping is placement of children in certain academic tracks as a result of performance on either achievement tests or another kind of ability test.

Mr. **Weiss**. And is there a circumstance under which ability grouping is illegal or in violation of title VI?

Mr. **Califa**. Yes, when it has been used to perpetuate the de jure system that was in place in many school districts. Some schools have used ability grouping to separate the white students from the black students and put them in different classrooms.

Mr. **Weiss**. You had just mentioned a little bit ago the *Dillon* case, so that I assume that you're familiar with the ability grouping case in Dillon County, SC.

Mr. **Califa**. Yes, sir. There are two *Dillon* cases, and I'm generally familiar with them.

Mr. **Weiss**. OK. Has OCR found ability grouping to be a violation of title VI in South Carolina?

Mr. **Califa**. Yes, sir.

Mr. **Weiss**. And did Mr. Singleton or anyone else at OCR suggest that cases involving ability grouping be dropped?

Mr. **Califa**. Yes.

Mr. **Weiss**. The request to drop the ability grouping cases was made even though OCR found that the ability grouping is illegal, is that correct?

Mr. **Califa**. It was more of a suggestion to drop ability grouping cases in general. I don't recall any conversation with me.

Mr. **Weiss**. As a request, right; suggested even though the OCR found that that particular practice is illegal when it results in racial isolation.

Mr. **Califa**. Yes, sir.

Mr. **Weiss**. As the Director of Policy and Enforcement Service, were you involved in higher education desegregation cases?

Mr. **Califa**. Yes, sir.

Mr. **Weiss**. If a State college system is in violation of title VI, is OCR required to seek and approve an acceptable desegregation plan?

Mr. Califa. Yes, sir.

Mr. Weiss. If the plan is entered into in good faith but does not remedy the illegal segregation, should OCR continue enforcement under title VI?

Mr. Califa. Yes, sir.

Mr. Weiss. So good faith efforts alone are not enough to remedy a title VI violation, is that correct?

Mr. Califa. That's certainly correct in my mind.

Mr. Weiss. Did Mr. Singleton ever ask you to legally support an argument that States are in compliance with title VI because they had shown good faith even though the desegregation goals had not been reached?

Mr. Califa. Yes; he did. He often made that suggestion.

Mr. Weiss. Do the desegregation plans for nine States, known as the first-tier States, expire this year?

Mr. Califa. Yes.

Mr. Weiss. Has OCR taken a position on those plans?

Mr. Califa. No, sir.

Mr. Weiss. Upon receiving a complaint, does OCR normally attempt to reach a voluntary settlement through early complaint resolution?

Mr. Califa. That is correct.

Mr. Weiss. If early complaint resolution fails and OCR conducts an investigation, does it always try to resolve the case before the findings are published?

Mr. Califa. That is another method called "pre-LOF."

Mr. Weiss. Preletter of finding, right?

Mr. Califa. Yes, sir.

Mr. Weiss. OK. Do the settlements accepted by OCR always meet the legal standards established by the courts and by civil rights law?

Mr. Califa. As Mr. Singleton testified, I don't think anyone knows. For such a great manager, that is certainly a piece of information that would seem important to know, but we—(OCR)—don't have it.

Not only did the Justice Department question the ECR procedure, but it was questioned internally by the service that I headed, saying that, as a Government agency, we could not knowingly subsidize and ignore a violation of law, and Mr. Singleton had to have been aware of that, because we wrote him memos on that.

He may have forgotten, but within his own office, there were questions about the validity and legality of ECR.

Mr. Weiss. Do you recall enforcing a matter involving Langston University in Oklahoma?

Mr. Califa. Yes, sir. It involves actually the whole State of Oklahoma.

Mr. Weiss. And you were appointed to head a team negotiating a settlement with that school; is that correct?

Mr. Califa. I was the head of a team for a brief amount of time, yes, sir.

Mr. Weiss. And was the school cooperative with your negotiating team?

Mr. Califa. Extremely cooperative.

Mr. **Weiss**. Was there anything unusual about the negotiation with Langston?

Mr. **Califa**. Not in my mind. Except when we had met with the Langston representatives and the representatives of the Oklahoma higher education officials, I was there and some people who were in my office were there negotiating with representatives from Langston and from the Oklahoma Board of Regents, and we had been arguing about what should be done to enhance Langston—Langston was in trouble.

It was nowhere near its goal of 38 percent white at the Langston campus, which at one time Mr. Singleton said they had to get to, and then directly contradicted himself at a later time.

So, we were discussing these matters, and terminated the meeting, saying that we would meet again. I and my staff left; and 15 minutes later just walking down the hall, we noticed they were all in Mr. Singleton's office, and that was about the end of my involvement in the Oklahoma matter.

From then on, Mr. Singleton did not use me or the other professional staff who had worked on this issue.

Mr. **Weiss**. So that the Langston officials had met with Mr. Singleton, had reached a settlement with him—is that correct?

Mr. **Califa**. Well, it—they reached a settlement with him, but I don't want to give you the impression that it was reached that day.

Mr. **Weiss**. Right. Do you know if Mr. Singleton assumes the undertaking of settlement negotiations very often?

Mr. **Califa**. Quite often.

Mr. **Weiss**. We had a discussion with Mr. Singleton a little bit ago on the Department of Justice on November 13, 1981, communicating with the Director of Planning and Compliance Operation Service for the Office for Civil Rights, in which it said:

> The apparent willingness of OCR to accept any agreement which results in a withdrawn complaint regardless of the substance of that agreement could lead to a weakening of your enforcement posture in our litigation position when dealing with a different recipient in a similar factual situation.

Mr. Singleton testifies that until, in fact, our staff brought that letter to his attention he was not aware of its existence.

Were you aware of the existence of that communication from the Justice Department?

Mr. **Califa**. I was certainly aware that they had problems with the procedure, and we, the policy and enforcement staff, had a lot of the same problems, and those problems were communicated to both Mr. Clarence Thomas and Mr. Singleton, and I believe that the December whatever—December 1983 quality assurance memo certainly communicated those concerns.

And so, yes; I believe that he was aware of them.

Mr. **Weiss**. You personally communicated those concerns to Mr. Singleton?

Mr. **Califa**. I can't remember whether I did or not.

Mr. **Weiss**. Then, on what basis do you make the statement that you know that those concerns were communicated to Mr. Singleton?

Mr. **Califa**. Well, it was a major issue. It was an issue that really pitted the one part of the office, the—what we call PCOS, which is the Planning Compliance Operations Service against the Policy and Enforcement Service.

We had strong views. They wanted ECR. We thought there were problems with ECR. It wasn't a secret. It would have been hard not to know about it.

Mr. **Weiss**. And tell me about the resolution of the preletter of finding resolution. Did that also precipitate discussion within the office as to the appropriateness of preletter of finding resolutions?

Mr. **Califa**. No; not as much. We were concerned about finding out what kinds of settlements the regions were accepting; so we were concerned about monitoring and we never—PES never got an opportunity to see what kinds of settlements the regions were accepting, under pre-LOF or ECR.

Mr. **Weiss**. And we were having a discussion with Mr. Singleton about the *DeKalb County* case.

Are you familiar with that case at all?

Mr. **Califa**. Not to any great extent.

Mr. **Weiss**. You were not personally involved in the resolution of that case and the final withdrawing of the complaint or settlement of the complaint?

Mr. **Califa**. Oh, no. By that time, I had been given my new assignment of policy codification.

Mr. **Weiss**. Say it again.

Mr. **Califa**. Policy codification. When Mr. Singleton mentioned he moved some people around, I was one of the people he moved around. I was put in a small office, given no telephone, given no secretary, and told to look at policy for the last 20 years.

Mr. **Weiss**. And when did that take place?

Mr. **Califa**. In November 1984.

Mr. **Weiss**. And that's what you have been doing since?

Mr. **Califa**. Yes, sir.

Mr. **Weiss**. OK.

Mr. **Califa**. Could I mention one more thing?

Mr. **Weiss**. Please.

Mr. **Califa**. On the monitoring issue that quality assurance was supposed to be doing, Mr. Singleton mentioned that the reason quality assurance was disbanded was because it was not necessary for them to do monitoring on other staff needs, and that the monitoring was being done in the regions.

My understanding is the way this was determined was in the following way. During one conference call Mr. Singleton said, "By the way, Regional Directors, you all are doing monitoring, aren't you?"

And they all said, "Oh, yes. We sure are."

And I had never seen a report from any regional director since that time that discusses monitoring. There is very, very little monitoring going on.

Mr. **Weiss**. Are you familiar with the switch for compliance review surveys to a random site selection basis? Were you involved in any of those determinations or discussions relating thereto?

Mr. **Califa**. I was involved in some of them; yes.

Mr. **Weiss**. And tell us what you understand the basis for that determination was?

Mr. **Califa**. Well, the idea—the basic idea, I think, was that there would be less of a backlash from school officials if they were told their selection as a site was randomly done, much like the IRS selects people to audit.

Traditionally, we had a large problem in saying to school districts and universities that there are indications that you are out of compliance, that you have civil rights problems, and so we are going to do a compliance review. They come back to us then and say:

> What is this, grand jury? Are you indicting us? Why don't we have a chance to give you some evidence that might convince you not to come on site?

So—at least, in my understanding, that was the basic reason for the move to random selection, or one of the reasons.

Mr. **Weiss**. And finally, can you tell us whether, in your judgment, the Office for Civil Rights is, in fact, pursuing and undertaking the obligations set forth in the various civil rights laws which it is charged with enforcing?

Mr. **Califa**. I'm sorry, Mr. Chairman——

Mr. **Weiss**. Tell me your judgment as to whether, in fact, the Office for Civil Rights is doing its job in enforcing the law?

Mr. **Califa**. I think that there has been a marked decrease in the Office's vigor in enforcing the law. There have been great morale problems. We have lost numbers of people that are really amazing.

In January 1981, my former service had 111 people; yesterday, it had 61. A lot of those are lawyers that have left.

There is not much of substance going on in my mind. What has been going on has been a lot of filling out of management reports, and indicating how much time you use the computer, and indicating how many copies of your management report you made. There is a lot of that activity, but there is very little civil rights enforcement going on.

Mr. **Weiss**. And did I miss the word, the key operative word where you said "there is a marked blank in vigor"?

Mr. **Califa**. Decrease.

Mr. **Weiss**. Decrease in vigor.

Thank you very much, Mr. Califa. If there is anything else that we have not asked that you want to comment on before you conclude your testimony, you can take the time to do that.

Mr. **Califa**. I don't think that there is anything else.

Mr. **Weiss**. Thank you very much.

Mr. **Califa**. Thank you.

Mr. **Weiss**. The subcommittee now stands in recess.

[Whereupon, at 1:36 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

INVESTIGATION OF CIVIL RIGHTS ENFORCEMENT BY THE DEPARTMENT OF EDUCATION

WEDNESDAY, SEPTEMBER 11, 1985

House of Representatives,
Intergovernmental Relations
and Human Resources Subcommittee
of the Committee on Government Operations,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2247, Rayburn House Office Building, Hon. Ted Weiss (chairman of the subcommittee) presiding.

Present: Representatives Ted Weiss, John Conyers, Jr., Robert S. Walker, and John G. Rowland.

Also present: James R. Gottlieb, staff director; Marc Smolonsky, professional staff member; Pamela H. Welch, clerk; and Martha Morrison, minority professional staff, Committee on Government Operations.

Mr. **Weiss.** Good morning. The subcommittee will come to order.

Today, we will conduct the subcommittee's second oversight hearing on the Department of Education's enforcement of Federal civil rights laws which prohibit discrimination on the basis of race, sex, handicap, or age.

During the subcommittee's first hearings into civil rights enforcement by the Department, we reviewed the record of the Office for Civil Rights, not only in this administration, but in administrations dating back to 1969. The testimony we heard portrayed policies of lax enforcement in every administration, Democratic and Republican. We heard that American citizens have been forced to sue the Office for Civil Rights because it was not enforcing laws when civil rights violations were found. Today, OCR is under a Federal court order to investigate cases according to certain timeframes. That order was made originally because OCR had consistently dragged its feet in past administrations when discrimination was found.

OCR now relies on voluntary settlements in discrimination cases, some of which we will review today. When voluntary settlements cannot be reached, OCR occasionally refers cases to the Department of Justice for enforcement. The majority of the cases referred to Justice have languished there for several years, with nothing being done to correct the violation of law uncovered by OCR. Other cases have been returned to OCR by the Justice Department with no action taken. We hope to learn why at today's hearing.

We will also review, on a case-by-case basis, the disposition of a variety of investigations conducted by OCR during the last 5 years which have led to administrative enforcement hearings.

Our only scheduled witness is Harry M. Singleton, the Assistant Secretary for Civil Rights at the Department of Education. Mr. Singleton testified at the subcommittee's July 18 hearing and will continue his testimony today.

I will be inserting at the end of the record several documents and letters exchanged between OCR, the Department of Justice, and the subcommittee prior to today's hearing. The Department of Justice letter transmits summaries of cases referred by OCR to Justice since January 1, 1981, and the Assistant Attorney General for Civil Rights has requested that these summaries be included in the hearing record, and we are pleased to have that done.

At this time I would also like to welcome a delegation from the Canadian House of Commons, who are visiting Washington, and have honored us by choosing to attend today's public hearing. They are members of the Committee on Public Accounts, and they are accompanied by the Canadian Auditor General.

We welcome you and hope that you will find your stay with us informative, and we will understand if you have to leave while the hearings are still going on.

Mr. Singleton, please take your place at the witness table. Before you sit down, it is the practice of the committee to swear in witnesses. Please raise your right hand.

Do you swear that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?

Mr. SINGLETON. Yes.

Mr. WEISS. Please take your seat.

If you have any other of your associates from the Department who you wish to accompany you at the table, that is fine; or if from time to time you want to call on them for support of testimony, that is all right, too. Anybody who does have anything to state for the record will, of course, also be sworn in.

Mr. Singleton, before we commence, do you have an opening statement that you would like to make?

STATEMENT OF HARRY M. SINGLETON, ASSISTANT SECRETARY FOR CIVIL RIGHTS, U.S. DEPARTMENT OF EDUCATION

Mr. SINGLETON. No; Mr. Chairman, I don't have an opening statement this morning. I am prepared to again try and attempt to answer your questions.

Mr. WEISS. Mr. Singleton, during your testimony before the subcommittee on July 18 you repeatedly stated that OCR did not maintain copies of files referred to the Department of Justice. Following the hearing, you sent me a letter which said your testimony was incorrect and that you had received wrong advice from your staff.

Without objection, your letter will be entered into the record.

[The letter follows:]

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE ASSISTANT SECRETARY FOR CIVIL RIGHTS

JUL 18 1985

Honorable Ted Weiss
Chairman
Intergovernmental Relations and
  Human Resources Subcommittee
Committee on Government Operations
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

During my testimony of July 18, 1985 before your Subcommittee, I testified that it was my understanding, based on advice from my staff, that the only copy of files for cases referred to the Department of Justice (DOJ) since 1981 were forwarded to DOJ with the case. Following my testimony, I again met with OCR staff to get to the bottom of the issue. My staff now informs me that they were wrong, and the advice given me was incorrect.

OCR has available here in Washington, D.C. some documents for all the cases in question. In many of the cases, some of the documents available are only key documents such as the letter of findings and the referral letter. In other cases we have more extensive files here in Washington, D.C. In many of the cases, most of the back-up investigative materials are in the regional offices. Much of this information is very voluminous. We are requesting our regional offices to forward all investigative records for these cases as soon as possible. However, in one of the cases identified thus far, staff has determined that all OCR files were transferred to DOJ.

The records and documents located in Washington are available for the immediate review of your staff. We will advise you when the documents from the regional offices are available.

I regret any inconvenience that my statement may have caused the Subcommittee. Please have your staff contact Thomas Esterly, of my staff, to establish a time for review of the documents currently available in the headquarters office.

Sincerely,

Harry M. Singleton
Assistant Secretary
  for Civil Rights

cc: Honorable Robert S. Walker
    Ranking Minority Member

Mr. **Weiss.** Now let me ask you, starting out with some compliance review questions, is OCR required to conduct compliance reviews?

Mr. **Singleton.** Under the *Adams* court order, the court order states something to the effect that OCR will conduct a compliance review program. The way we interpret that portion of the *Adams* order is that compliance reviews are something that we have to do.

Mr. **Weiss.** Yes. But it is a fact also that your own regulations, that is, the Department of Education regulations, specifically section 100.7 sub A, mandates periodic compliance reviews. Isn't that correct?

Mr. **Singleton.** Yes.

Mr. **Weiss.** Briefly tell us what does a compliance review encompass?

Mr. **Singleton.** Well, a compliance review generally is very similar to a complaint in terms of the types of issues involved with the exception that the issues are generally of a broader nature. A complaint usually, unless there are some classwide implications, will deal with an individual's problem. A compliance review generally goes in and looks at systemic types of problems, problems that are of a wide-ranging nature that would affect a number of people, not just one or two.

Mr. **Weiss.** Right. And it is a fact, is it not, that as distinguished from the complaints that are brought by individuals, compliance reviews are for the most part initiated by the Office for Civil Rights itself on the basis of its selection of issues and sites to determine if school districts, schools or States, are in compliance with Federal civil rights laws?

Mr. **Singleton.** Without a doubt a compliance review is something that is initiated by the Office for Civil Rights.

Mr. **Weiss.** Right. And if noncompliance is found, OCR is authorized to undertake enforcement actions administratively or through the Justice Department; is that correct?

Mr. **Singleton.** That's correct.

Mr. **Weiss.** OK. Are compliance reviews a method of assuring that illegal discrimination does not occur in our school systems?

Mr. **Singleton.** A compliance review is a method that we can employ to review the status of a recipient of our funds and to determine if, in fact, those funds are being used in a discriminatory manner. If they are, we can then do something about it.

Mr. **Weiss.** OK. Let me apologize for chewing on a lozenge. I am working on a cold, so maybe this will help.

Would you like to eliminate compliance reviews?

Mr. **Singleton.** No, I don't think so. I don't think we can eliminate compliance reviews.

Mr. **Weiss.** On March 18, 1985, you asked the OCR Operations Support Service to conduct a study of the feasibility of using technical assistance as a substitute for enforcement and compliance reviews; is that correct?

Mr. **Singleton.** That's correct.

Mr. **Weiss.** Now in handwritten notes at the bottom of your request you ask, and I quote now: "Can TA be used to eliminate the need for compliance reviews in certain circumstances, in all circumstances?"

Do you believe that OCR has the legal authority to eliminate compliance reviews and substitute them with technical assistance?

Mr. **Singleton.** Well, I don't know. That's the question. That's something for the legal staff to take a look at to make some judgments on.

You have to understand, Mr. Chairman, that wasn't any pronouncement of policy. That was an assignment to our staff to take a look at this to see whether or not technical assistance is something that we can use in our compliance effort. And you have to frame the question such that they could give you a complete review and analysis.

Mr. WEISS. But the question that you asked was whether technical assistance can be used to eliminate the need for compliance reviews in some or in all circumstances?

Mr. SINGLETON. That's right; to get a complete answer to the question. That's not a policy determination. I mean, their answer would have to come back and have to be reviewed, and whether or not that's something we would want to do from a public policy standpoint. But nevertheless, it seems to me that that's not inappropriate, to ask the question.

Mr. WEISS. In commenting on the study project you requested, your own Policy and Enforcement Service warned in a July 9, 1985, document that "the proposed memorandum presumes that the basic premise of the project is legally appropriate, a presumption which is not presently supportable."

Given your office's finding that such a move is illegal, has the Department requested that Congress change the law regarding compliance reviews?

Mr. SINGLETON. I'm sorry, Mr. Chairman, I don't follow your question. I missed something there.

Mr. WEISS. Well, in response to the study project that you say that you requested, in the course of which you asked in your handwritten notes, can the TA be used to eliminate—can technical assistance be used to eliminate the need for compliance reviews in certain circumstances or in all circumstances, the Policy and Enforcement Service in response to that on July 9, 1985, wrote to you: "The proposed memorandum presumes that the basic premise of the project is legally appropriate, a presumption which is not presently supportable." That is, the presumption of trying to eliminate the need for compliance reviews in certain circumstances or in all circumstances. They told you that is not a premise that can be supported legally.

And so my question is, since that was their determination, their advice to you, are you still pursuing the issue of eliminating compliance reviews in any or all circumstances? And if so, are you seeking congressional efforts to change that legislation?

Mr. SINGLETON. Well, I, you know, I don't think that we need to go that far in that one, Mr. Chairman, because it seems to me that you may have information that I don't have. I am not aware that my policy enforcement staff has sent to me a memo stating that.

Now I know that there was some work going on between two services. My Operation Support Service sent me a memorandum outlining a proposal to proceed with this particular assignment. However, there was a memo that was sent to the Operation Support Service Director by the PES Service Director—policy enforcement staff—which raised some legal questions and stated that these questions as threshold issues had to be dealt with before we went further with this. And I concurred in that—that we have to look at the legal issues here to see whether or not this is a viable thing to do before we go forward with this.

Now that's all that I know. I don't recall seeing any memo from my policy enforcement staff to me saying that this was illegal. Maybe you——

Mr. WEISS. Well, I'm not sure what works its way up to you, Mr. Singleton, but the memo that we're referring to is dated July 9, was stamped July 9, 1985, and it was addressed to Frederick G. Tate.

Mr. SINGLETON. Yes. That's——

Mr. WEISS. It says: "Re: Offering technical assistance to recipients selected for compliance reviews."

In any event——

Mr. SINGLETON. I think, Mr. Chairman, that that's the same thing that I was just talking about. Frederick Tate is the Service Director for the Operations Support Service, and he had sent a proposal to proceed with this assignment but the Policy and Enforcement Service raised some legal questions about that and cautioned that we should resolve those before we move forward. And I concur in that, and concurred in that and directed them not to go forward until the legal staff had an opportunity to reviews these issues.

Mr. WEISS. And is it your current position then that technical assistance cannot be a substitute for compliance review in any or all circumstances?

Mr. SINGLETON. In all circumstances?

Mr. WEISS. Yes.

Mr. SINGLETON. I think that if you're technically speaking, no, I don't think so. The whole issue here was to—I have to back up, if I may take a minute or two to try and explain the position a little bit. What we find in many instances out there is that recipients don't know what is required of them under some of these civil rights laws. Take 504, for example, the regulations dealing with those with handicapping conditions, the disabled. And what we find there is that with some technical assistance and explanation to recipients what they have to do, they are more than happy to take care of the problem and eliminate the problem, and we can therefore get on with it with very little effort at all.

So the question became if that is the case, then why don't we look at technical assistance as a way to possibly avoid getting ourselves in a situation where we have to go through a compliance review, saving those resources for more serious types of problems and more intractable issues and resolving the other problem that was more resolvable with a technical assistance effort. That was the whole thrust of the project.

Mr. WEISS. I am trying to understand clearly what your position is. Your position then is that, even though the regulations and the court order mandates compliance reviews as you have described it, that in circumstances which you deem appropriate or the office deems appropriate you can, in fact, forgo that compliance review and instead offer technical assistance to the particular school or institution to help them to correct the conditions which would find them in violation. Is that what you are telling us?

Mr. SINGLETON. That's basically it, yes. What the compliance review would result in anyway, would be an effort to settle the matter, because our regulations require us to enter into voluntary, or at least attempt voluntary settlement, before we can go to enforcement. Rather than expend resources on something that is very resolvable had the parties known what was required of them could save those resources for more intractable problems.

The point is that it was an effort to find some additional method to increase our efficiency and our effectiveness realizing, of course, our resources are not infinite. It was not an effort to totally do away with compliance reviews.

Mr. WEISS. Before we go on let me indicate the presence now of one of our distinguished members of the subcommittee, Mr. Rowland of Connecticut. Nice to have you with us.

Last year, Mr. Singleton, the quality assurance staff conducted a study of investigative cases closed during May and June of 1983. The study found a case error and defect rate of 28 percent. The error and defect rates ranged from 0 to a high of 67 percent.

What actions did you take in response to those findings?

Mr. SINGLETON. Well, I don't recall, Mr. Chairman, that particular report much less what I did in response to it. There are some problems with the QA [quality assurance] process generally, and one of the things that we had engaged in was a review of our QA process. There were some real problems I think there in terms of what was considered a defect or what was considered an error, and so forth.

Mr. WEISS. Well, now you said in the course of that answer that you do not recall that study. You don't recall that study being submitted to you by the quality assurance staff?

Mr. SINGLETON. No, Mr. Chairman, I don't recall it. I may have received it, but, you know, I receive a lot of memos over the course of a period of time. And I may have received it, but I just don't remember it.

Mr. WEISS. Then I ask staff to show you, to hand you a copy of this report, "Quality Assurance Report of Reasonable Performance in Processing Cases Closed in May–June, 1983." Take a quick flip through it, see if you recall it, if that refreshes your recollection.

[Mr. Singleton inspects document.]

Mr. WEISS. No recollection of that?

Mr. SINGLETON. I don't recall reviewing this report, Mr. Chairman. I think that the way this was treated when it came to my office was to treat it as a draft report and it was given to a task force that we had on quality assurance as part of their task or their charge. They were to look at our quality assurance program and to see if we could revamp the way we went about examining, grading, if you will, cases. But I don't recall personally seeing this particular——

Mr. WEISS. Tell us, if you will, for the record what the aim of the quality assurance unit was. What was its purpose?

Mr. SINGLETON. The quality assurance function, Mr. Chairman, in the Office for Civil Rights is akin, if you will, to quality control in, say, a factory. QA would review our case processing activities. In addition to case processing, I also mandated that quality assurance look at headquarters services, too, in terms of how headquarters components are servicing the needs of the regional offices. All in an effort to gauge how well we're operating internally.

Mr. WEISS. And they were to then bring their findings to your attention I assume. The quality assurance unit was supposed to be an aid to you in determining the kind, the caliber, of the work that the Office for Civil Rights was doing. Is that right?

Mr. SINGLETON. Well, technically I think that's right. You know, I can't do it all. I have staff that I delegate a lot of these things to, and the deputy probably would have been dealing with this report.

Mr. WEISS. And the report, the information about the case error and defect rate of 28 percent and the defect and error rates ranging from 0 to a high of 67 percent, that information had not been brought to your attention?

Mr. SINGLETON. I don't recall that, Mr. Chairman. I don't recall.

Mr. WEISS. Now, another one of the concerns mentioned in the quality assurance report, that same report, involved the failure to implement a 1980 memorandum of understanding between the Office for Civil Rights and the Architectural and Transportation Barriers Compliance Board. Do you know why that memorandum had not been implemented?

Mr. SINGLETON. A 1980 memorandum?

Mr. WEISS. Right.

Mr. SINGLETON. No. I know nothing about the 1980 memorandum, Mr. Chairman, and I know nothing about this particular issue. I don't recall that.

Mr. WEISS. Well, are you familiar——

Mr. SINGLETON. Are you speaking of the memorandum with OSERS? The Education Department component we call OSERS?

Mr. WEISS. No. I have, and I am going to ask you to look at this part of the document. If you will get the copy, Pamela.

We will dig it out for you. A memorandum stamped "23 November 1983," to Harry M. Singleton, Assistant Secretary for Civil Rights, from Burton M. Taylor, director, quality assurance staff, subject: Memorandum of Understanding between the Department of Education and the Architectural and Transportation Barriers Compliance Board.

Does that refresh your recollection?

[Mr. Singleton inspects document.]

Mr. SINGLETON. No, it doesn't, Mr. Chairman. This is almost 2 years old. I can't recall this.

Mr. WEISS. And you are not familiar with the issue of an understanding in 1980 between the Office for Civil Rights and the Architectural and Transportation Barriers Compliance Board?

Mr. SINGLETON. No. No, I'm not. But you know, OCR has a lot of memoranda of understanding with various agencies in the Government, Mr. Chairman, to do their civil rights investigation work for them in various programs that they have. So it's possible that we certainly have that but I'm not personally aware of the MOU.

Mr. WEISS. If I told you that the Architectural and Transportation Barriers Compliance Board was an interagency board in the Federal Government created to try to coordinate approaches to dealing with transportation and architectural barriers for handicapped people, would that refresh your recollection as to what the issue was about?

Mr. SINGLETON. No, Mr. Chairman. I must state that I don't remember this memo nor do I remember a—or recall an MOU with the Architectural Transportation Safety Board.

Mr. WEISS. OK. The memorandum, the 1980 memorandum of agreement was designed to coordinate overlapping jurisdictions between OCR and the Compliance Board. The November 1983 quality assurance report found that OCR lacks sufficient expertise to ensure adequate compliance with the two respective laws involved in these issues.

In light of the quality assurance findings, what has OCR done to train its staff regarding adequate compliance with the handicapped transportation and architectural barriers?

Mr. SINGLETON. I don't know.

Mr. WEISS. The quality assurance report also found that the Office for Civil Rights had no standards for determining the adequacy of grievance procedures in section 504 and title IX employment cases. Even though the laws require that employers who receive Federal education funds must adopt grievance procedures, OCR has no way of determining the adequacy of grievance processes.

Have standards been issued as a result of this recommendation?

Mr. SINGLETON. Mr. Chairman, try and understand. Now, is this part of that report that I told you I had not seen? Was this all part of that one report?

Mr. WEISS. Well, it's——

Mr. SINGLETON. Based upon review of those cases or what?

Mr. WEISS. Mr. Singleton, what you have before you is a compilation of a series of reports and recommendations and studies. The one that I have just referred to, and we'll dig that out for you also, so that you can look at it, is stamped as "received 2 March 1984." It's addressed to Harry M. Singleton, Assistant Secretary for Civil Rights, from Burton M. Taylor, director, quality assurance staff, subject: Standards for assessing grievance procedures.

I will ask you to look at that, and ask if that refreshes your recollection?

Mr. SINGLETON. No, wait a minute. This is the Architectural and Transportation Barriers. It's the one I just looked at. OK.

[Mr. Singleton inspects document.]

Mr. SINGLETON. Again, Mr. Chairman, I don't recall this particular memo.

Mr. WEISS. OK. Now let me ask you a question about process. These last two memoranda were addressed directly to you from the person who was the director of the quality assurance staff, and you say that you have no recollection of them.

Are you saying that you never saw them? That somebody else in your office saw them? That none of this material was brought to your attention?

What happens to a memo such as these last two which are addressed to you from people who are charged with assessing the procedures and programs and expertise and capacity of the agency?

Mr. SINGLETON. Well, the way it typically works is that it would probably be assigned to the Deputy Assistant Secretary to take a look at for some action or response. I would get a copy of it. It would not be something for me to take direct action on unless, of course, the service director or senior staff member wanted to have a briefing, to get me to make some decision. If it were a decision memo with my name on it, then I would generally have to make the decision on it.

Now when I get these information copies sometimes I read them and sometimes I don't, depending upon the press of work that I have and other priorities. I try to read everything that comes across my desk, as I think my staff will tell you, but I never admitted to having a photographic memory. I cannot remember a lot of these things. And some of these things are forgotten as quickly as they are read. I may have received this memo and I may have read it, Mr. Chairman. What I am telling you is I don't remember seeing it at this point.

Mr. **Weiss**. These are not information memos, that is, memos for your information. These are addressed directly to you. Is that correct?

Mr. **Singleton**. Yes, that's correct. But I just told you what the process was. It is not asking me to make a decision. There is no—we have a format for——

Mr. **Weiss**. Again, if you look at the bottom, the very last——

Mr. **Singleton**. It just says "I recommend."

Mr. **Weiss**. "I recommend that you instruct PES to develop standards for the evalution of grievance procedures under section 504 and title IX."

Now when that kind of recommendation comes to you from the director of your quality assurance staff, is there any record that anybody responded to that or brought it to your attention and said: "Mr. Secretary, we have to do something to respond to this"? Yes, no, or perhaps?

Mr. **Singleton**. No. I think that the other thing to keep in mind here, too, Mr. Chairman, is that this is not some definitive—in my view at any rate—definition of a problem. His assessment may or may not be accurate.

Mr. **Weiss**. Right. But did you have somebody look at it to see whether his assessment was accurate or not?

Mr. **Singleton**. Sometimes that happens, sometimes it doesn't, depending——

Mr. **Weiss**. Well, how do you know whether in fact that assessment was valid or not?

Mr. **Singleton**. I don't know. I don't know whether it was valid or not. That's what I'm telling you. And I don't know if anyone else looked at it. I don't recall doing anything with it. I don't even recall a memo.

Mr. **Weiss**. But here you have a quality assurance unit and you have a director of that unit, and they are charged with reviewing the knowledge, the expertise, the operations of the Office for Civil Rights. They bring to your attention and make recommendations to you about certain flaws in the operation of the office.

Take this particular instance aside. When that kind of thing happens, do you believe that you have an obligation to respond, at least to say: Listen, we think you are off the wall, we don't think that we have to address this issue, or we will refer it to Joe to deal with that question? Do you have any kind of response mechanism to recommendations that come to you?

Mr. **Singleton**. No. Not necessarily, no.

Mr. **Weiss**. In the case of a complaint against Granville County School District, OCR accepted a voluntary settlement which called for the district to establish grievance procedures. However, the procedure agreed to by the district did not cover former employees even though the complainant in this case was a former employee.

How did this settlement correct the violation of section 504 in the complainant's case?

Mr. **Singleton**. Mr. Chairman, I couldn't begin to answer that question. I don't know. I don't have the specifics of that case. I don't recall that case.

Mr. **Weiss**. The instance that I cite comes from that same memo that we have just been discussing that was addressed to you and stamped "2 March 1984." If you couldn't read them yourself, I would suggest that perhaps if you have somebody read memos addressed to you and bring the substance of them to your attention, perhaps you would begin to respond to them.

Mr. **Singleton**. No, Mr. Chairman, that happens. The people read these memos. But whether or not these types of memos coming from the QA staff would trigger a whole series of reexaminations and so forth is not an automatic thing. We have to sit down and—I would want a second opinion on it before I started——

Mr. **Weiss**. Did you ask for a second opinion?

Mr. **Singleton**. I don't recall.

Mr. **Weiss**. Is there a process for asking for a second opinion?

Mr. **Singleton**. Yes; there is a process for that.

Mr. **Weiss**. Who is in charge of the second opinion process?

Mr. **Singleton**. I am in charge of the second opinion process.

Mr. **Weiss**. OK. So a memo dated March 2, 1984, comes to you with a recommendation and you say that you have not seen it or read it or have any recollection of it. How does that get to anybody else for a second opinion?

Mr. **Singleton**. The memo would be assigned to the Deputy Assistant Secretary or an assistant or an attorney adviser to take a look at to follow up on the recommendations, or at least the allegations made there to see whether there is anything of any substance to them; and if so, they would recommend that I take further action on it. Then what I would do, possibly, is give an assignment to my Policy and Enforcement Service to take a look at the issues that have been raised by the QA staff to see whether or not there is something to them and something that we need to do and, if so, what is it.

Mr. **Weiss**. Was that done in this case?

Mr. **Singleton**. I don't know. I'm telling you I don't remember the memo. I cannot remember this.

Mr. **Weiss**. Who on your staff was present, would have a recollection of it?

Mr. **Singleton**. I don't know. My Deputy Assistant Secretary, who was acting at that point, may remember this. What is the date on this?

Mr. **Weiss**. March 2, 1984.

Is your Deputy Assistant Secretary here?

Mr. **Singleton**. My current deputy is, yes. But the person that was acting at that point is not, no.

Mr. **Weiss**. On May 15, 1984, quality assurance recommended to you that clear guidance be provided to the regions on the conduct of investigations of discriminatory practices in school athletics. Quality assurance found that investigators in some cases were not adequately assessing factors involved in such discrimination and that investigation has been limited to individual schools and not applied districtwide.

Did OCR remedy this situation outlined by the quality assurance staff last year?

Mr. **Singleton**. I don't recall, Mr. Chairman.

Mr. **Weiss**. Again, in the pile, the stack of documents that are in front of you there is a memorandum dated May 15, 1984, to Harry M. Singleton, Assistant Secretary for Civil Rights, from Burton M. Taylor, director, quality assurance staff, subject: "Guidance to regions for conducting interscholastic athletics investigations."

Now, if you look at that, does that refresh your recollection?

Mr. **Singleton**. Yes. Not necessarily this particular recipient here, but the general issue about medical schools and our jurisdiction over medical schools, yes, it does. This is something that we have been dealing with for some time. Yes.

Mr. **Weiss**. Do you have the one in front of you referring to interscholastic athletics investigations, May 15, 1984?

Mr. **Singleton**. No; this says jurisdiction over medical and other health-related professional schools. It is dated May 15, 1984. It seems as though there were a series of memos on May 15, 1984.

[Mr. Singleton inspects document.]

Mr. **Singleton**. Again, Mr. Chairman, I don't recall this particular memo. You know, but that is not to say that I did not read it when it came to me, I just don't recall it.

Mr. **Weiss**. Do you recall or know whether OCR remedied the situation outlined by the quality assurance staff in that memo?

Mr. **Singleton**. That I don't know. I would have to check with my Policy and Enforcement Service to find out whether anything was—first of all, whether or not this is a valid allegation or problem, if you will, and whether or not anything was needed to be done to take care of it.

Mr. **Weiss**. Also in the stack of documents that you have before you is a memo dated May 21, 1984, from Antonio J. Califa to Burton Taylor, director of quality assurance staff. And at the very end of that memorandum—we will dig that out for you—there is a statement which says, "as you are aware Policy and Enforcement Service has drafted a document that provides detailed guidance on the conduct of interscholastic athletics investigations. That document which will soon be submitted to the Assistant Secretary for review once some revisions are made to take into account Grove City which generally require investigation of all factors applicable to the recipients of interscholastic athletics programs."

Do you know if that document was finalized and issued, that is, the detailed guidance document?

Mr. **Singleton**. No, I don't, Mr. Chairman.

Mr. **Weiss**. Take a look at the last paragraph of that memo.

Mr. **Singleton**. Now this is from Califa to Taylor, so I would not have seen this in any event.

Mr. **Weiss**. But that is a followup to the May 15 memoranda from Mr. Taylor to you outlining the problems in the conduct of interscholastic athletics investigations.

Anyhow, you have no recollection as to whether that document that is referred to was ever finalized and issued?

Mr. **Singleton**. No, I don't. It may very well have been, but I don't recall.

Mr. **Weiss**. Quality assurance also informed you that OCR had no formal guidelines for referral of complaints to other civil rights enforcement agencies. Memorandum dated June 5, 1984, to you from Mr. Taylor, subject: "Referral of complaints to other agencies when OCR has no jurisdiction." It cites that, for example, in one case involving the lack of minority representation on an elected school board OCR had no jurisdiction and closed the case. But quality assurance noted that school board election inequities are subject to the requirements of the Voting Rights Act and that the case could have been referred to the Department of Justice.

Has OCR now established guidelines for the referral of cases to other Federal agencies?

Mr. **Singleton**. Well, if I'm not mistaken, Mr. Chairman, I thought that we did have referral procedures for referring cases to other agencies for action. These would be contained in our IPM. So we do have procedures for referring cases. They have been in existence for some time.

Mr. **Weiss**. Well, they were obviously not in existence as of June 5, 1984. Are you telling us that since that time the revised IPM has included the requirement that civil rights complaints allegations outside of OCR's jurisdiction be referred to the appropriate agency?

Mr. **Singleton**. Well, it is true that our IPM has been revised. It was my understanding that we have sections in that IPM, I can't cite it chapter and verse for you, but the IPM does have procedures for referring cases to other agencies.

These are the procedures for transferring. Now the specific criteria upon which we would decide whether something should go to a particular agency or another is another matter.

Mr. **Weiss**. All that the recommendation says, as of June 5, 1984, it cites the case that I refer to and points out that although OCR may not have jurisdiction, other Federal agencies do under other Federal laws which may have been violated. And it says that QAS—quality assurance—recommends that revised IPM should include a requirement that all civil rights complaint allegations outside OCR's jurisdiction be referred to the appropriate agency.

Now that means to me that as of that date that was not part of the IPM, and I am asking if, in fact, that is your understanding also and whether, in fact, since June 5, 1984, the IPM has been revised to include such a requirement?

Mr. **Singleton**. Yes. I'm pretty sure it has. This was a recommendation—you know, the IPM, the new IPM wasn't promulgated until around this time, a little after that, and so this seems to me to be Taylor's effort to make a recommendation on the improvement of the revised IPM. There was a period of time where I was seeking input from all the senior staff on the IPM—the new, the revised IPM.

Mr. **Weiss**. Yes.

Mr. SINGLETON. And this appears to be one of those kinds of things where he is making a recommendation on how the IPM could be improved. But as far as I understand it, the new IPM does have procedures for referring cases.

Mr. WEISS. But as of June 5, 1984, it did not; is that what you're saying?

Mr. SINGLETON. Well, under the old IPM it may very well have been that there were no procedures. But under the new one there is.

Mr. WEISS. Well, would you again double check and please submit us the information as to whether in fact that has been done and give us a copy of the revised IPM if you have it?

Mr. SINGLETON. This section, or the——

Mr. WEISS. This particular revision.

Mr. SINGLETON. OK.

Mr. WEISS. In 1983, OCR received a complaint against the Lower Massachusetts Public Schools alleging racial discrimination and charging that the district's voluntary desegregation plan was not working. Region I decided not to investigate the complaint because the school board was about to amend the original desegregation plan. However, the school board did not amend the plan and continued the original plan unchanged. Without an investigation, region I could not determine a violation or proper remedies.

Do you approve of this type of response to a complaint? That is, of deciding not to investigate the complaint because the school board was about to amend the original desegregation plan?

Mr. SINGLETON. Well, I think that every case, Mr. Chairman, has to be looked at on its own individual merits. I don't know at this point what the particular factors or considerations were beyond your characterization of the issue here. I would think, as a general matter, no, we wouldn't want to just rely on that particular representation. I mean, we would have to do something more. But then, again, I don't know what the particular facts were in that situation.

Mr. WEISS. In another case, St. Joseph the Provider College, quality assurance found that a college had no obligation to provide support services to a handicapped complainant because he was not handicapped according to the definition of section 504. Quality assurance assessed OCR's handling of the case as defective because the complainant had a learning disability and was handicapped.

I know OCR has guidelines regarding section 504. How is it possible for a competent investigator to incorrectly determine what constitutes a handicap?

Mr. SINGLETON. I don't know. Not only are there competent investigators there, but there are competent legal people as well reviewing these cases. So, this is why I say, I mean, QAS may have been "off the wall" on that one. I don't know. Bear in mind that these assessments are just their review of it and it may be necessary to have a second look at the issue before, you know, I take their assessment as gospel.

Mr. WEISS. Well, again this is included in that report of the quality assurance group which details the facts of the case. And if, in fact, they may have been off the wall and if it required a second opinion, the question again is, was it, in fact, sent to somebody for a second opinion or for review?

Mr. SINGLETON. Again, wasn't this—this is the original package that you showed me? I thought I stated that that was a draft and we took it as a draft. I don't know that was ever finalized.

Mr. WEISS. There is no marking on that report that it's a draft. It's a submission to you from the quality assurance group.

Mr. SINGLETON. Well, maybe it may not be marked as a draft, but I think the way it was dealt with was as a draft report until it could be finalized. Some of these things could be——

Mr. WEISS. What difference does it make, Mr. Singleton, whether it's a draft or not a draft if in fact what you have is a submission of a case analysis and report finding flaws in the operations of the office?

Mr. SINGLETON. Mr. Chairman, quality assurance was finding flaws in how regions were handling the paperwork on cases, that is, whether or not they had put a copy of a letter in the file or two copies in the file. I mean, this is one of the reasons why I had the whole process relooked at. In my view the way that QAS was going about its work, its review of these cases, lacked something to be desired.

Now I don't know what happened to this particular case. I don't know if anything was done on this. I don't recall this. I don't recall the report. I don't recall this particular section or this particular case.

Mr. WEISS. In 1983, OCR conducted a compliance review of admissions and recruitment at the New England School of Law and concluded that the school's recruitment practices were nondiscriminatory. Yet, quality assurance found that minority enrollment had declined at the school, that the school bypassed schools with high minority enrollments during recruiting trips, and that OCR had not even conducted an onsite review of the school.

What was done to correct this incomplete compliance review?

Mr. SINGLETON. I don't know.

Mr. WEISS. In another case, Bennington-Rutland Supervisory Union, the parent of a handicapped child complained that her son was not being properly evaluated by the school district and that she believed other children were also not being properly evaluated. Solely because she could not provide information about the other children OCR dismissed the complaint. Yet, had the parent complained only about her son the complaint would have been investigated.

Is this in keeping with OCR policy?

Mr. SINGLETON. That doesn't sound right to me, Mr. Chairman.

Mr. WEISS. Well, it doesn't sound right to me, either, but that is what was done.

Mr. SINGLETON. Well, I don't know that that's in fact the case, either.

Mr. ROWLAND. Mr. Chairman.

Mr. WEISS. Mr. Rowland.

Mr. ROWLAND. Mr. Chairman, if I may, I would just like to make a comment and perhaps pose a question.

It is my understanding that the Department handles literally thousands of complaints, and I see the direction that you are going and I appreciate that. Perhaps what we can do as we get into some of the specifics of the case and the questions that you have, you can submit them to the Department for answers.

I would like to concentrate a little bit on some of the processes. For example, when you talked about the memos and what was the process for handling memos, and what is a draft and what is not a draft, and how Mr. Singleton looks at things that do come to that department. And maybe we can talk about the general process of how those things are applied.

Mr. Singleton, if you would make a comment. When something just comes——

Mr. WEISS. Mr. Rowland, if you will?

Mr. ROWLAND. Yes.

Mr. WEISS. Let me finish this line of questioning.

Mr. ROWLAND. OK.

Mr. WEISS. And then I will turn it over to you. OK?

Mr. ROWLAND. That will be fine.

Mr. WEISS. In the case of the Omaha Public School System, OCR closed a complaint alleging an unfair due process system for handicapped children, a violation of section 504, because the parents moved to another locality. OCR did nothing to ensure that in the future the school system would comply with section 504. The quality assurance staff found this to be defective case handling.

Do you agree that the district should have been asked to provide assurances that it would no longer violate section 504?

Mr. SINGLETON. No, I don't know that I would agree with that on the facts that you have stated, Mr. Chairman. We don't know all the facts in that case. It may very well have been that that district did not have a problem. That they are taking care of all the people within their boundaries, within their district, and that the issue here was whether or not these people were in the district at all. I mean, I think that may have been the issue there.

Mr. WEISS. Assume that the facts that I gave you were in fact correct because these are the facts that were set forth by quality assurance. Assume that in fact you have a complaint alleging an unfair due process system for handicapped children, a violation of section 504, and the case was dismissed because the parents moved to another locality.

Assume that to be the facts. And if OCR did nothing to ensure that in the future the school system would comply with section 504, would you agree that that is defective case handling? Assuming the facts as I gave them to you.

Mr. SINGLETON. I would agree that if it came to our attention that we had a recipient that was failing to follow the appropriate due process procedures and a complainant did not want to proceed with the complaint or for whatever reason didn't want to go forward with it, that we nevertheless ought to take a look at the fact that that recipient did not have appropriate due process procedures in place and do something about it.

Mr. WEISS. In a Pueblo school district case quality assurance found that OCR dismissed a sex discrimination complaint alleging inequitable funding of home economics courses compared to traditionally male courses. The complaint was dismissed without examining the amount of funds expended in the district.

Is it normal procedure for a complaint regarding funding inequities to be resolved without examining the funding?

Mr. **Singleton**. If we don't have jurisdiction, yes.

Mr. **Weiss**. There was no question about jurisdiction.

Mr. **Singleton**. Well, I don't know. I am not going—I don't know what all the facts were in that case, Mr. Chairman. It is difficult for me to sit here and answer these hypotheticals like this.

Mr. **Weiss**. I have just two more questions along these lines.

On May 21, 1985, Secretary Bennett issued an order in the case of a title VI violation involving a school district in Hughes, AR. The order remanded the case to an administrative law judge because the Secretary disagreed with the findings, and it turned out that that case was settled and dismissed 2 years previously.

How did that occur? Why would a matter like that be allowed to get to the Secretary's office without his being apprised that the case had already been settled and dismissed?

Mr. **Singleton**. There was obviously some sort of snag in the procedures that were being followed by the reviewing authority. OCR had settled the case and sent the appropriate documentation forward, but apparently the reviewing authority did not pull the case back from the Secretary.

But since that time we have raised the issue again with the staff of the reviewing authority and we think that the procedures that have been worked out would prevent that sort of thing from happening again.

Mr. **Weiss**. Mr. Rowland.

Mr. **Rowland**. Thank you, Mr. Chairman.

Mr. Singleton, I don't think anybody expects you to be able to have instant recall on many of the specifics and certainly on a number of the memos that were discussed going back a couple of years. I would just like to get some kind of an idea of how many complaints your office takes, how long it takes on the average to take care of those problems, have there been significant increases?

Mr. **Singleton**. Well, on the average our office receives somewhere in the neighborhood of about 2,000 cases a year. And we are required by court order to process all of those cases by a certain period of time. It all works out in the wash to about 235 days unless there is some extended timeframes that we may employ or the case is tolled for one reason or another. That is specified by the court order.

As I have stated before, the court order—the timeframes set up by the court order are unrealistic. No one has ever really been able to comply with them 100 percent. I think that we are currently complying with the court ordered timeframes better than has ever happened before in the history of that court order. But nevertheless, the timeframes set up bear no real relationship to what we have to do when we go out to investigate complaints.

On the average I think we are taking about 225 to 235 days to resolve these complaints. But in many other instances we take longer.

Mr. **Rowland**. How has the *Grove City* Supreme Court decision affected the process? Your operation?

Mr. **Singleton**. Well, the *Grove City* case, because of its program specificity requirements, has caused us to have to spend more time establishing the jurisdiction for our investigations. We have to spend the time to find the Federal financial assistance in the program in which the discrimination is being alleged, and that sometimes can be difficult and can take quite a bit of time. But we try to do that as expeditiously as we can in the very early goings, obviously.

Mr. **Rowland**. During the chairman's questioning a thought came to me with regard to your quality assurance. When the memos and suggestions, or when the quality assurance people were making determinations, what triggers action in your department on those suggestions? It is reviewed. I believe you mentioned a task force. How do you determine what would trigger action, what is reviewed, and so forth?

Mr. **Singleton**. Well, you have to put the whole thing in perspective. Our regional offices have their own quality assurance activity in place. Quality assurance, at the headquarters' level is another layer of bureaucracy, if you will. Headquarters' quality assurance review has been a source of a lot of problems over the years because of the way the reviews are done. Defects and errors are assessed—very minor, sometimes insignificant kinds of things. They are second-guessing regional judgment.

That is not to say that they do not pick up on some significant problems from time to time. That certainly does happen, or did happen. But the thing is that quality assurance, at least in the headquarters' area, was looked at as more of a nuisance than it was a help. That was one of the reasons why I had a task force look at our whole quality assurance function to see if we couldn't improve it.

It is a very serious charge, in my judgment, to state that a regional office had handled a case improperly, and I wanted to make sure that the process by which we were going about that review was a substantial one and certainly one that would make some sense.

So I had a task force put together to take a look at our quality assurance function, of the kinds of things that we were looking at, the standards, how we would review the cases, whether we, you know, would have a random sample done, whether we would have them all sent to headquarters or whether I would have a quality assurance staff go from region to region to sit in the regional office and get the bulk of the files, and so forth, and go through them. So it was quite an exercise that we were involved in.

You have to also put in perspective, too, these memos from a performance ratings standpoint. People are trying to earn outstanding ratings and part of that results in the generation of this kind of paper. So a lot of this, a lot of these reports, and so forth, in my view were that sort of thing. I didn't necessarily, to the extent that I saw them, felt that it was something that I had to jump right on, on top of and do something about.

If other members of the staff who were also plugged into this felt that this was a significant thing, then it would come to my attention directly for some action and we would do something about it.

Mr. **Rowland**. Do you feel it's working?

Mr. **Singleton**. What?

Mr. **Rowland**. Your task force, in conjunction with the quality assurance?

Mr. **Singleton**. Yes, the task force has not yet completed its work, but a substantial part of the work has been done. They are yet to issue a final report to me, I believe. So I think that it's working. I think from the bits and pieces that I have seen along the way, it looks pretty good to me.

Mr. **Rowland**. Thank you. Thank you, Mr. Chairman.

Mr. **Weiss**. Thank you, Mr. Rowland.

Mr. Walker?

Mr. **Walker**. No questions at this time.

Mr. **Weiss**. Now, let me see if I understand again. The headquarters quality assurance unit was disbanded; is that right?

Mr. **Singleton**. Yes, that's correct, Mr. Chairman.

Mr. **Weiss**. When was that done?

Mr. **Singleton**. It was done over a period of time. As a result of pressing resource needs, I started detailing people out over a period of time into other services.

Mr. **Weiss**. Starting when and completed when?

Mr. **Singleton**. I don't know, Mr. Chairman, when that started. As far as it being completed, again, I don't know specifically, maybe June, maybe——

Mr. **Weiss**. Of what year?

Mr. **Singleton**. This year.

Mr. **Weiss**. Of 1985?

Mr. **Singleton**. Yes; maybe June, maybe May, somewhere in that neighborhood. I don't remember for sure.

Mr. **Weiss**. Now, was that done on the basis of the recommendations of a task force?

Mr. **Singleton**. No, no, that was done purely on the need to have some additional staff plugged in. My Policy Enforcement Service—with the many enforcement actions that we have going and the policy guidance machinery that we had set up there—was constantly crying, if I can use that expression, to me for assistance. I began to detail some of the personnel out of QAS to assist them in that endeavor.

Mr. **Weiss**. Where were the quality assurance people sent? Where were they reassigned?

Mr. **Singleton**. Mostly to Policy Enforcement.

Mr. **Weiss**. When was the task force set up?

Mr. **Singleton**. I would say approximately a year ago, maybe a little longer.

Mr. **Weiss**. Who comprises the task force?

Mr. **Singleton**. I don't recall now the specific personnel. My style of management, when I have an entractable problem, is to put together a task force to deal with it. I like to have representation on that task force from the headquarters and regional components.

This task force would have been put together in pretty much the same fashion.

Mr. **Weiss**. It would have been, but who in fact comprises the task force?

Mr. **Singleton**. I don't remember the personnel.

Mr. **Weiss**. Who was in charge of the task force?

Mr. **Singleton**. The then Acting Deputy Assistant Secretary was in charge of that task force.

Mr. **Weiss**. But the then Acting Deputy Secretary is no longer there; is that right?

Mr. **Singleton**. He is no longer acting as Deputy Assistant Secretary.

Mr. **Weiss**. OK. Who took his place as head of the task force?

Mr. **Singleton**. He is still the head of the task force.

Mr. **Weiss**. OK. How many people serve on the task force?

Mr. **Singleton**. I don't remember, Mr. Chairman. Probably five.

Mr. **Weiss**. How frequently have you received reports from the task force?

Mr. **Singleton**. Again, I can't tell you specifically. I received a number of briefings. I may have received one or two reports. I can't recall. But I did receive feedback from the task force as——

Mr. **Weiss**. What was the responsibility that you assigned to the task force?

Mr. **Singleton**. The task force charge was to take a look at our quality assurance structure, to make some assessment about how it could be improved, particularly looking at the elements that the quality assurance group would look at in terms of judging a particular activity.

Mr. **Weiss**. Was that direction, that charge, to them put in writing?

Mr. **Singleton**. I believe so.

Mr. **Weiss**. Would you supply the subcommittee with a copy of the memorandum?

Mr. **Singleton**. If it's in writing, I will certainly do that. If not, we will put to writing what the oral charge was. I believe it's in writing, Mr. Chairman. I just don't know for a certainty. I can't say here to you that, yes, it was done. I mean, generally it's done.

[See appendix, p. 220.]

Mr. **Weiss**. OK. They were charged with making recommendations regarding the quality assurance unit which you have disbanded, you say not on the basis of their recommendation. So, what are they doing now?

Mr. **Singleton**. What's who doing now?

Mr. **Weiss**. What is the task force doing currently since the——

Mr. **Singleton**. Wrapping up their work. You have to understand, because the headquarters quality assurance group was disbanded does not mean that there's no quality assurance going on. Every regional component has a quality assurance function that they are carrying out.

Mr. **Weiss**. Would you supply this subcommittee with whatever reports, or briefing papers, or memoranda, which the task force has supplied to you since its creation?

Mr. **Singleton**. Will do.

[See appendix, p. 221.]

Mr. **Weiss**. Mr. Singleton, going on to another subject, is it correct that State higher education systems that had at one time prohibited blacks from enrollment, and that still have the vestiges of unconstitutional segregation violate title VI of the Civil Rights Act of 1964?

Mr. **Singleton**. Any system of higher education that we currently have under review is one that has been alleged to have vestiges of a formerly de jure segregated system, and that has been judged to be in violation of title VI.

Mr. **Weiss**. Under title VI, is OCR empowered to enforce the prohibition against segregation in State higher education systems?

Mr. **Singleton**. Yes.

Mr. **Weiss**. In 1969 and 1970, long before your arrival, OCR notified 10 States that they were in violation of title VI because they had not dismantled their dual systems of higher education. The 10 States refused to submit desegregation plans or submitted plans OCR found to be inadequate.

What enforcement methods are available to OCR in a situation such as the one I just described?

Mr. **Singleton**. The enforcement mechanism that will be available to us, Mr. Chairman, in that situation, like it is in all others, is to begin an administrative enforcement proceeding to terminate all Federal financial assistance or to refer the matter to the Department of Justice for action in the Federal courts.

Mr. **Weiss**. Now, did the Office for Civil Rights take enforcement action against those States before the *Adams* court ordered OCR to negotiate corrective action plans or begin enforcement proceedings? In fact, since 1973, has OCR taken any enforcement action against those States that was not directed by the *Adams* court?

Mr. **Singleton**. OCR has taken enforcement action against at least, I guess, four States. The way that was done was not to use administrative enforcement proceedings but to refer the matters to the Department of Justice for action in the courts.

Mr. **Weiss**. OCR's record in these matters is important because the desegregation plans for Florida, Georgia, North Carolina, community colleges, Arkansas and Oklahoma, known as the first tier States, expire this year. OCR is required to make determinations regarding the progress of each of these plans.

What is the status of the evaluation processes of the States?

Mr. **Singleton**. It's ongoing.

Mr. **Weiss**. OCR requested these plans in 1969 and 1970. Three years later, the *Adams* court found that OCR had defaulted in enforcing the law even though violations were based on OCR's own findings of discrimination. The court then mandated the plans; is that correct?

Mr. **Singleton**. Yes, that's right.

Mr. **Weiss**. Under the law, OCR is requiring these school systems to eliminate the vestiges of de jure racially segregated school systems. According to a 1984 OCR memorandum regarding the desegregation plans, the States, "Have not heretofore even approximated what might be considered the elimination of the vestiges of dual systems."

But I understand that OCR has never set a minimum standard for determining compliance in these States. So at this point OCR has no method of determining final compliance with the law; is that correct?

Mr. **Singleton**. I don't think that's correct, no.

Mr. **Weiss**. Have you in fact set minimum standards for determining compliance in these States?

Mr. **Singleton**. No, I think that you have to look at every State, Mr. Chairman, separate and apart from the other. I don't think that I could go in and set minimum standards with which they would all have to comply. I mean, that's like making round pegs fit square holes, beat them down if they don't fit.

I think that OCR has published criteria which the States were to look at to use as guidance in developing their plans. Their plans are going to be the measure by which we make some determination as to whether or not they are in compliance.

Mr. **Weiss**. The Justice Department recently announced that it will now use a good faith standard in measuring the success of desegregation plans and that implementation of the plans, not the actual achievement of the plans, will be the final measurement of success.

Will the Department of Education use the good faith standard to measure the success of the desegregation plans of the first tier States?

Mr. **Singleton**. Let me put it to you this way, Mr. Chairman. I think what the Department of Education will do is look at the performance of the States under their plans. Remember now, under court order and under the imprimatur of the court, OCR has accepted plans from every State which are designed to eliminate the vestiges of the formerly de jure system.

What OCR will do is review these plans and review the activities, the commitments that were made by the States under these plans. Those commitments have been made. If they have followed through, made good on their promises to do what they said they were going to do, I think that that is going to be the key upon which we are going to make the determinations as to whether or not they are now in compliance, whether the vestiges have been removed.

Mr. **Weiss**. So that it is not enough, according to that response you just made, that they be making good faith efforts, but that you are going to be looking for actual achievements in the implementation of the plan; is that correct?

Mr. **Singleton**. I am going to be looking for the accomplishments of the steps and measures that they stated they were going to take. That's what I am going to be looking for.

Mr. **Weiss**. On February 11, 1985, you issued guidance to regions 3, 4, 6 and 7 on evaluating higher education desegregation plans. You noted in this memorandum that in the past OCR had measured desegregation plans by the achievement of the plans' objectives.

Do you disagree with the past policies of measuring a plan's effectiveness by the achievement of its objectives?

Mr. **Singleton**. If you are talking about numbers, yes. I think that what you have to be very, very careful of here, Mr. Chairman, when you start talking about numbers which are set as goals, is that they can become quotas very quickly. I think we all agree that quotas are an anathema, we don't like them, they are not appropriate. So we have to be very careful about how we view these numbers that they have set out for themselves. Because once that becomes the final determiner, then I think then it's operating as a quota, and we have a problem.

Mr. **Weiss.** Quotas aside, do you disagree with the past policies of measuring a plan's effectiveness by the achievement of its objectives?

Mr. **Singleton.** If we are talking about measuring the achievement of the objective by the number only, then, yes, I am very concerned about that because I think it becomes a quota.

Mr. **Weiss.** Your February 11 memorandum instructs the regions to stop measuring the plan's achievements and change the standard to a measurement of the good faith in which the plan was implemented regardless of whether or not it actually achieved desegregation.

Now, why are you changing the standard of measurement in light of the response that you gave to me earlier?

Mr. **Singleton.** I am not changing. Anyone who's worked on higher education with me knows what my position is, and has been consistent throughout, and that is, that we are going to look at the steps and measures by which these States go about achieving these goals, not the numbers themselves.

Mr. **Weiss.** In that February 11 memorandum, you wrote, and I am quoting now:

> In the past, the enrollment and employment sections of our evaluation letters and status reports have been focused primarily around the achievement of plan objectives and have deemphasized the implementation of measures. For example, in many instances when objectives were achieved, there was little discussion of the implementation of measures. When objectives were not achieved, new measures were requested sometimes without an assessment of the reasonableness of previous implementation or consideration of whether additional measures are feasible and likely to produce better results. Although I have continually stressed the need to shift the focus of our analysis to measures, additional work is needed.

Now, under this new policy, if OCR finds that a State has not eliminated the vestiges of a previously dual system of higher education but has implemented the plan in good faith, will the State be considered in compliance with the law?

Mr. **Singleton.** I will make the decision, Mr. Chairman, based upon the plan that the State has put into effect to eliminate the vestiges. If the State has done everything that it is committed to do to increase minority enrollment, let's say, at a TWI—traditionally white institution—it has done everything that it has committed itself to do and has done everything else that it could be reasonably expected to do, and it still hasn't achieved its goal, then to hold that State culpable for that—if I can use that phraseology—would be making that goal a quota. And I am not going to do that. This administration does not support quotas, and I will not conduct my affairs of this office in a fashion so as to give quotas credence.

Mr. **Weiss.** So that you are now modifying the answer that you gave me when I asked you the very first question.

Mr. **Singleton.** No, I am not modifying, Mr. Chairman.

Mr. **Weiss.** All right, let me repeat then. I asked you at the very beginning of this area of questioning: Is it correct that State higher education systems that had at one time prohibited blacks from enrollment and that still have the vestiges of unconstitutional segregation violate title VI of the Civil Rights Act of 1964? What is your answer to that?

Mr. **Singleton.** My answer was yes.

Mr. **Weiss.** And your answer is still yes?

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Mr. SINGLETON. That's right.

Mr. WEISS. So that even though they are in violation of title VI of the Civil Rights Act of 1964, so long as they have implemented a plan, that's OK as far as the Office for Civil Rights is concerned or as far as you are concerned; is that right?

Mr. SINGLETON. Mr. Chairman, what are vestiges of discrimination? What are vestiges of the formerly de jure segregated system. I mean, this is——

Mr. WEISS. Assume, Mr. Singleton; assume, Mr. Singleton, that the vestiges are there.

Mr. SINGLETON. What are the vestiges?

Mr. WEISS. Assume that they are there; assume that the vestiges are there, right?

Mr. SINGLETON. Right.

Mr. WEISS. In spite of the reasonable effort that's been made or the good faith effort that's been made. You said in the first question that I asked you, the response was—and you just reaffirmed—that you consider that to be a violation of title VI of the Civil Rights Act.

Then as we proceeded, you said that in fact if they made a reasonable effort, then that's satisfactory as far as you are concerned; is that right?

Mr. SINGLETON. I said that, in response to your first question, that if the vestiges remain, then we would have a problem making any kind of judgment as to whether or not they are in compliance with title VI.

You then asked me what I was going to be looking for, and I told you I was going to be looking at their plans which were designed to eliminate the vestiges of desegregation. Those plans were designed for that, under court order, the court's imprimatur is on them.

Now, that's the stand by which I am going to be judging them. Each State is different. Each State's plan is different.

I told you further that I am going to be looking at the steps and measures that they are taking, because those steps and measures, Mr. Chairman, are also very important. You seem, from the line of questioning that you are using here, you seem to be implying that they are not. That what is important are the numbers at the end.

I submit to you that I think that what we look at when we talk of vestiges of a formerly de jure segregated system is that we are looking at process, we are looking at activities. And I think that when a State commits itself to do something that it wasn't doing before because of the formerly segregated system, I think that those steps and measures that it's taking go a long way, if not totally, to eliminate the vestiges. And that's what I am going to be looking at.

Mr. WEISS. OK. Now, we have a memorandum dated November 15, 1984, addressed to you from Frederick T. Cioffi, Acting Director for Policy and Enforcement Service. On page 12 of that memorandum, he says, in issue No. 5, how should elimination of vestiges be defined?

Your Acting Director for Policy and Enforcement Service said, and I quote, "Because the State systems with which it has been dealing have not heretofore even approximated what might be considered the elimination of the vestiges of dual systems, OCR has never defined how it would decide when that complete elimination of vestiges has been achieved in a State system."

So that we are not really looking to see what is a vestige at this point. Your own people say that the State systems have not even approximated what might be considered the elimination of vestiges.

Mr. **Singleton**. Mr. Chairman, this is a staff document. This was not meant to be any final delimiter, if you will, of what our policy ought to be. This was a thinking document that we put together. I asked the staff to start thinking about this because the first tier States—or at least five of the first tier States—plans are coming to a close in December, and to get a jump on this, to do some initial work on it, and start thinking about some of these things and get them down.

This is not any final work product yet, and I think we are still refining it in fact.

Mr. **Weiss**. Do you disagree with that finding, that statement? The statement that they have not even approximated the elimination of the vestiges de jure segregation?

Mr. **Singleton**. Again, yes, I disagree with that. I don't know what they are talking about. It may very well be that they are thinking that the vestiges are numbers.

Mr. **Weiss**. Mr. Rowland.

Mr. **Rowland**. No questions.

Mr. **Weiss**. Mr. Walker.

Mr. **Walker**. Mr. Chairman, if I may, please.

Let me try to understand where we are here because, in fact, Pennsylvania is one of the States that's been under court order. I think it is extremely important to follow exactly what it is you are saying. The Civil Rights Act of 1964, at least the legislative history of that act, makes very clear that you are on firm ground in stating that the act was not supposed to involve quotas. It has, over a period of time, been changed in the minds of some people to be a pro quota kind of act. But the fact is that the entire legislative history, including the language of the chief sponsors of the bill, made it very clear that quotas were anathema to what we were attempting to achieve in the Civil Rights Act of 1964.

Everybody has tried to stay away from using the term "quota" for that reason. So, instead, we have created artful terms of other kinds of goals and timetables along the way which, when combined, become a quota. And the situation in Pennsylvania is very clear on that point. What has happened is that there are schools in Pennsylvania in the State college, or now the State university system of Pennsylvania, that have made determined efforts to recruit minority students. They have sent recruiters into minority neighborhoods in the cities. They have put personnel on designed to deal with minority students exclusively. There have been all kinds of attempts to recruit minority faculty. And there have been extensive efforts under way to change what we all agreed was a wrongful system in the past.

The problem is illustrated by what happened in Pennsylvania. We had numbers that they were supposed to meet, and there were timetables connected with those numbers. If you did not reach 3.6 percent enrollment by such and such a time but instead only achieved 3.4 percent enrollment, despite all the good-faith efforts you had made to achieve that number, you were still regarded as in noncompliance. That is in fact a quota. I don't care what anybody else calls it. That is a quota.

It seems to me a standard which puts its emphasis on what the institution is doing in order to solve its problems is a system more in keeping with the Civil Rights Act of 1964 than one which simply takes a look at numbers and says, If you aren't achieving that number, you have not done what we required of you. And it seems to me that what we need to be doing is looking at the act.

If I understand correctly, what you are saying is that your Department is going to be looking at what the institutions are doing with regard to attempts to recruit minorities rather than looking purely at numbers. Is that a correct impression?

Mr. SINGLETON. Before I answer that, I would like to say that I concur in the gentleman's remarks. I think that you characterized it exactly correctly.

But in answer to your specific question, that's correct, we will not be looking at numbers. We are going to be looking at the steps and measures and the good-faith efforts, and so forth, that are being taken to comply.

Mr. WALKER. Is it your contention that, once you begin to use numbers, that you almost by definition create a quota?

Mr. SINGLETON. Absolutely.

Mr. WALKER. And that in fact, when you take a look at the whole history of the Civil Rights Act of 1964, that it was specifically designed to keep us away from quotas?

Mr. SINGLETON. Absolutely. I don't think there was any idea there that what we were talking about was establishing a system that would support quotas. I think that that is clear.

Mr. WALKER. So, when we begin to try to focus the attention of enforcement on the issues of numbers, we are in fact attempting to put in place a quota-based system, and that any instructions by Congress or any attempt to change a policy in a way that relies upon numbers as the measurement device is in fact a congressional admission that what they are seeking is a quota-based philosophy. Is that right?

Mr. SINGLETON. That's right, yes.

Mr. WALKER. Thank you, Mr. Chairman.

Mr. WEISS. In the course of the discussion before you first brought in the mention of quotas and numbers, we had not in our dialogue spoken about quotas or numbers. You do believe that the aim of the act was to eliminate segregation, do you not?

Mr. SINGLETON. Oh, yes, to eliminate discrimination.

Mr. WEISS. And segregation. Yes?

Mr. SINGLETON. I—yes.

Mr. WEISS. Yes?

Mr. SINGLETON. Yes.

Mr. WEISS. Thank you.

Mr. SINGLETON. Twice. Yes.

Mr. WEISS. OK.

Mr. SINGLETON. Maybe the mike's not picking my——

Mr. WEISS. I just wanted to be sure that in fact I got a yes from you.

Mr. SINGLETON. That's correct.

Mr. **Weiss**. OK

Now, therefore, regardless of what the plan in a specific State may say it wants to do, if it has not eliminated segregation, the problem has not been corrected, and that State is still engaged in an unconstitutional act. Is that correct?

Mr. **Singleton**. I don't know that I would agree with that.

You know, the chairman has to——

Mr. **Weiss**. Well, then I want to take you back again, Mr. Singleton, to the first question I asked you. Is it correct that State higher education systems that had at one time prohibited blacks from enrollment and that still have the vestiges of unconstitutional segregation violate title VI of the Civil Rights Act of 1964?

Mr. **Singleton**. And I said yes.

Mr. **Weiss**. Thank you.

Mr. **Singleton**. And I still say yes.

Mr. **Weiss**. OK.

Mr. **Singleton**. And my response stands to the question that you just asked.

Mr. **Weiss**. You do believe that it is possible to eliminate segregation in the higher education systems in the 10 States that we are speaking about. Is that correct?

Mr. **Singleton**. Well, it depends upon how the chairman defines segregation. We are clearly not going to sanction any segregation sponsored by any State that is receiving Federal funds.

Now, whether we are talking about a social engineering concept of equal numbers of race or racial groupings in schools down the line, I think that's something else again. It seems to me in this country of ours, we cannot mandate which schools people choose to go to. All a State can do is make a particular institution desirable enough to attract people. It can engage in recruitment activities. It can provide attractive financial aid packages. It may be able to do a few other things. But when it has done all of those things and the students still choose to go to one school over another, then the only thing that is left, it seems to me, is to establish quotas and mandate, dictate who is going where. And I don't think we want to do that. And that may be the situation that we are faced with. We may find that the State is no longer segregating its schools, not by any official State action; it's doing everything that it reasonably can do to ensure that students feel comfortable going to any school they want to. All the barriers to entry are now down. They are encouraging this. If the kids choose not to go, the students choose not to go to those schools, and we still have heavier concentrations of one particular race or another in certain schools, then we are getting into something else again.

Mr. **Weiss**. In 1977 the *Adams* court found that OCR had not done all required to obtain additional staff despite chronic personnel shortages. Has OCR expanded its staff since that determination?

Mr. **Singleton**. Since 1977?

Mr. **Weiss**. Right.

Mr. **Singleton**. OCR staff has expanded and then dropped again.

Mr. **Weiss**. The available figures show that the size of the OCR staff in 1980 was 1,201 and in 1985 at 925. Would you agree with those figures?

Mr. SINGLETON. Just a moment, let me check my figures before I agree with that.

What was your 1980 figure, Mr. Chairman?

Mr. WEISS. 1,201.

Mr. SINGLETON. No; my figures show approximately 1,055.

Mr. WEISS. For 1980?

Mr. SINGLETON. For 1980, yes.

Mr. WEISS. OK.

Mr. SINGLETON. You have to remember now, 1980, OCR was still part of HEW for part of that year. So, there may be some difficulty trying to factor out how many of those people were really OCR employees, I mean in Education, and how many of them were HEW employees.

Mr. WEISS. OK. Your number is 1,055.

Mr. SINGLETON. Yes; that is what I have here; yes.

Mr. WEISS. OK. And in 1985?

Mr. SINGLETON. Gee, I don't have the latest information on our FTE. But I would say we are approximately now, using an FTE figure, somewhere in the neighborhood of 914, 921 maybe, somewhere around there.

Mr. WEISS. OK.

Mr. Singleton, an internal 1981 OCR study of the timeframes established by the *Adams* order concluded that OCR staff shortages contributed to OCR's failure to consistently meet the *Adams* deadlines. This same study noted that OCR received 13 percent less funding than it had prior to the transfer, that is, from HEW to a separate department. Thus, the study concluded—quote—"with less resources OCR ED was expected to continue the same level of education activities," close quote.

Since these findings were reported, the Department of Education has requested even less staff and a smaller budget. In light of OCR's internal concerns about staff shortages, why haven't you recommended a larger budget?

Mr. SINGLETON. Well, I don't know that I agree with that report. I don't know that I agree with the premise there.

I think what is clear is that OCR was plagued with some great inefficiencies in the past, no management particularly. I think that what we have——

Mr. WEISS. As distinguished from the kind of management that you're giving it. Is that the idea?

Mr. SINGLETON. That's correct, absolutely. I mean all you have to do is look at the figures, and I think they speak for themselves. If you look at what we have done with fewer numbers of staff, as far as case processing is concerned, I think that you will find that our compliance with the *Adams* order is way up. Under the old way of doing things, if you had a problem, the way to deal with it was to throw more money at it and more staff at it. I think that it is well known that OCR has had some intractable management problems in the past. A recent scholar did a piece on OCR not too long ago, at least on the *Adams* order. One of the things that he was mentioning in his piece was the management problems that OCR had.

Our budget is now approximately $44.6 million. Our appropriation has been hovering in that area for at least the last 3 or 4 years. That level of funding has been more than adequate for us.

Mr. WEISS. Is it correct that OCR returned a substantial amount of funds to the Treasury in 1984 that could have been used for increased staff?

Mr. SINGLETON. I think we did have a surplus. I don't recall how large it was. But we generally have a surplus. I think that there was definitely one in 1984, but again I can't remember how large it was.

Mr. WEISS. Well, as a matter of fact, our records indicate that in 1984 $2.630 million lapsed and an additional $5 million was transferred to Howard University because Congress learned that all the money would lapse if not spent. Do you have any reason to disagree with those figures?

Mr. SINGLETON. Well, I don't know that as far as that $5 million is concerned that the concern that you expressed, put quite that way, was accurate. But I think that, yes, we got, if I am not mistaken, in 1984 we got quite a large appropriation to staff up to a higher level. And our orders were not to staff up to that higher level. So, we had a lot more money than we needed for the particular staff level that we had.

Mr. WEISS. In response to a question during the course of our discussion of the disbanding of the quality assurance staff, you said that you had to transfer that staff because of staff shortages.

Mr. SINGLETON. That's correct.

Mr. WEISS. Well, how does that square with the answer that you just gave, that you had more than enough staff to do the job?

Mr. SINGLETON. Well, the point that I am trying to make to you is that, you know, there are things called freezes from time to time that are imposed on us. The Department was operating under one of those. In fact, it still is, if I am not mistaken. So, to go out and do any hiring, any additional hiring, is a tough proposition. So, what I have to do as a manager is look to the staff that I have and make some judgments about where the priorities are and moving people around to take care of the immediate need that is manifesting itself. And that's what happened here.

Mr. WEISS. But that's quite distinct from saying that you have more than enough staff to deal with the problem——

Mr. SINGLETON. Well, I don't know if——

Mr. WEISS [continuing]. But what you just said to us is that——

Mr. SINGLETON. Maybe it's hyperbole, Mr. Chairman. I strike that—the point is I had more than enough staff. I have enough staff to do the job.

Mr. WEISS. But you had to disband the quality assurance people and reassign them elsewhere because of the shortage of staff. Is that right?

Mr. SINGLETON. I had to disband them because I couldn't hire any more people, right.

Mr. WEISS. Is it your view that in fact a quality assurance staff is something that is helpful in the operation of your office?

Mr. SINGLETON. Yes, and we have them. Every region has a quality assurance staff or function, and they have people working on it.

Mr. WEISS. But not at headquarters?

Mr. SINGLETON. Well, Mr. Chairman, that's a management decision. You see, all that quality assurance staff is doing is imposing another layer of bureaucracy over the process. It was just like case processing. It was slowing everything down. The regional offices are set up to take cases, to investigate them, and make recommendations to headquarters on what to do with those cases. What used to be the practice in OCR was, after the regional office finished its work on a case, it would send it to headquarters, and the legal staff in headquarters would reinvent the wheel on every single case. It was slowing the system down. It was slowing it way down.

I didn't need that second layer of bureaucracy. It was inefficient, wasting taxpayers' money to do that. So, I eliminated that.

The regional office is set up to do that job. They are going to do the job and do it right. Then that's what they're there for.

So, we eliminated that second layer of bureaucracy the same thing with quality assurance. We've got the regional offices doing it. Quality assurance in headquarters is another layer of bureaucracy when that staff could be utilized somewhere else more effectively. And that's what I did.

Mr. WEISS. The fact is, the quality assurance staff at headquarters made some very serious and important recommendations to you as to problems in the process, both at headquarters level and the regional level. You didn't like that, and that's why you disbanded the unit.

Mr. SINGLETON. Oh, is that your—that's your interpretation.

Mr. WEISS. That's it——

Mr. SINGLETON. I think that's unfair, Mr. Chairman, that really is.

Mr. WEISS. OK.

Including permitted exceptions——

Mr. SINGLETON. In fact, that's incredible. That's an incredible statement, and I take exception to that.

Mr. WEISS. You may take exception to——

Mr. SINGLETON. I want it on the record that I am taking exception to that.

Mr. WEISS. Do you know that, even in courts of law any more, you no longer have to have your exception noted to an objection being sustained or overruled; it's part of the record.

Mr. SINGLETON. I stand advised.

Mr. WEISS. Thank you.

Including permitted exceptions to timeframes under the *Adams* order, what is the maximum amount of time OCR has had to issue a letter of finding after receiving a complaint?

Mr. SINGLETON. OCR has 105 days to issue a letter of findings, unless exceptional timeframes are invoked, then it has an additional 90 days.

Mr. WEISS. So, the total is 195. Is that right?

Mr. SINGLETON. OCR has to issue a letter of findings by day 105. If exceptional timeframes are taken, then it can go 195.

Mr. WEISS. Right.

Mr. SINGLETON. But there are very, very limited circumstances in which you can take exceptional timeframes.

Mr. WEISS. OK.

On March 16, 1984, a complainant alleging discriminatory practices at the University of Arkansas was filed with OCR. When was the letter of finding in that case issued?

Mr. SINGLETON. I don't know.

Mr. **Weiss**. Would it surprise you if I told you it has not been issued as of this date?

Mr. **Singleton**. If the chairman is referring to a case that was brought up in the course of the *Adams* litigation, then would it surprise the chairman that that case had been settled, the issue involved in that case had been dealt with long before that accusation was made in the proceedings in which they were raised?

Mr. **Weiss**. Well, I just asked the question, and you said you don't know.

Mr. **Singleton**. I don't——

Mr. **Weiss**. Now you——

Mr. **Singleton** [continuing]. You asked me what specific——

Mr. **Weiss**. Now you are creating——

Mr. **Singleton** [continuing]. You asked me what specific date that LOF was issued, and I told you I didn't know.

Mr. **Weiss**. And now, when I tell you, would you be surprised if I told you that it hasn't been issued yet? Now you're inventing a response. Is that what you're doing?

Mr. **Singleton**. No. What I am saying is that, if the chairman is referring to a particular case, then he may be surprised to know some additional facts in that matter.

Mr. **Weiss**. Now, fiscal year 1984 was not the only time OCR funds lapsed or were used for purposes not related to civil rights. Between 1980 and 1984 isn't it a fact that $19 million appropriated for OCR was not used for civil rights matters?

Mr. **Singleton**. Mr. Chairman, I can't really answer that. I don't know. It may be right. I know that we routinely have money left over at the end of the year.

And there are reasons for that.

Mr. **Weiss**. An OCR study of the *Adams* timeframes noted that all findings of violations must be approved by the Secretary and that the minimum clearance time for these findings approved by headquarters is 4 weeks. The study found that in all cases with findings of violations, OCR would fail to meet the *Adams* due dates because of headquarters' delays. Does it still take 4 weeks for letters of finding to be approved by headquarters? If so, why does it take so long?

Mr. **Singleton**. No, I don't know that that is accurate. Sometimes if a case is particularly complex, it may take that long. It may take longer. In some instances it may take less. You know, it varies.

Mr. **Weiss**. How much time does it take on the average?

Mr. **Singleton**. I really can't hazard a guess. I would be afraid to hazard a guess to you.

Mr. **Weiss**. So that, when you say that you don't think that it's 4 weeks, you don't really have any basis for saying that?

Mr. **Singleton**. No, I don't.

Mr. **Weiss**. OK.

Let the record indicate that we have been joined by our distinguished colleague from Michigan, Mr. Conyers.

Since January 1, 1981, OCR has referred 23 cases to the Department of Justice. How many of those cases were referred during 1981?

Mr. SINGLETON. I don't recall, Mr. Chairman. I would have to try and check some——

Mr. WEISS. My information is that there were none referred in 1981.

Mr. SINGLETON. OK. Well then——

Mr. WEISS. Would you have any reason to disagree with that?

Mr. SINGLETON. Is that information supplied to you by my staff? Then I will accept it.

Mr. WEISS. My information is that there were three cases referred in 1982. Do you have any reason to disagree with that?

Mr. SINGLETON. Three?

Mr. WEISS. Three. In 1982.

Mr. SINGLETON. No. That sounds about right.

Mr. WEISS. OK.

And our information is that there were 20 cases referred in 1983. Do you have any reason to disagree with that?

Mr. SINGLETON. That sounds a bit high, but if that's what my staff provided you, then I will accept that.

Mr. WEISS. It's a total of 23 cases.

There were no cases referred in 1984 according to our information. Do you have any reason to disagree with that?

Mr. SINGLETON. Well, I would feel uncomfortable saying that I would agree with that, because I thought that there had been at least one or two that we have referred.

Mr. WEISS. We are working from the list that had in fact been supplied by you to us.

Mr. SINGLETON. OK——

Mr. WEISS. Those are the numbers, and I want them for the record.

Mr. SINGLETON. Then fine. I will stipulate then to all of that.

Mr. WEISS. OK.

Now, it's also our information that most of the cases referred in 1983 were referred on a specific date. Is that your recollection as well?

Mr. SINGLETON. It probably would be, Mr. Chairman, because we were operating under very, very strict court orders at that point to deal with a number of cases. And I think that we probably transferred a bunch of them over on 1 day.

Mr. WEISS. It's a fact that OCR was under a March 11, 1983, order by the *Adams* court to move certain cases for enforcement by a certain date. Is that correct?

Mr. SINGLETON. That is correct.

Mr. WEISS. And that was the reason that so many cases were referred to Justice that year, in 1983?

Mr. SINGLETON. Well, I don't know that I would characterize it quite that way. We referred a number of cases to Justice that particular year, as we were cleaning up a backlog of cases.

Mr. WEISS. Well, the fact is that the cases referred to Justice were labeled by you as part of the—quote—"*Adams* enforcement packages" in a July 28, 1983, memorandum. So that, in fact, what you're telling us——

Mr. SINGLETON. They are transition cases, as we call them.

Mr. WEISS. Pardon?

Mr. SINGLETON. They are transition cases, as we call them.

Mr. **Weiss**. They were the *Adams* enforcement packages. That's how you described them.

Mr. **Singleton**. Yes. We refer to them as transition cases, Mr. Chairman.

Mr. **Weiss**. You do not deny that you labeled them as part of the *Adams* enforcement packages in a memo of July 28, 1983, do you?

Mr. **Singleton**. Perhaps I did. I don't recall the July 28, 1983, memo. I mean, I must have——

Mr. **Weiss**. Does the Justice Department have prosecutorial discretion in regard to the cases referred to it by OCR?

Mr. **Singleton**. The Justice Department, as far as I understand it, Mr. Chairman, has prosecutorial discretion over any matter that it has, for enforcement.

Mr. **Weiss**. OK. However, OCR does not have such discretion, does it? If OCR finds a violation of law, it is bound to enforce the law. Isn't that correct?

Mr. **Singleton**. Under the *Adams* order, we don't have any prosecutorial discretion other than whether we might take the enforcement action ourselves or send it to Justice for action.

Mr. **Weiss**. Is the Department of Justice bound by any general court order to enforce the law regarding discrimination in educational systems and institutions?

Mr. **Singleton**. I don't know, Mr. Chairman.

Mr. **Weiss**. But OCR, as you said, is bound by the *Adams* order.

Mr. **Singleton**. That's correct.

Mr. **Weiss**. So, if OCR finds a violation involving a school district that refuses to voluntarily comply with the law or negotiate a settlement with the Department of Education, and OCR does not refer the matter to the Justice Department, then you are required to eventually take the matter before an administrative law judge, are you not?

Mr. **Singleton**. Yes.

Mr. **Weiss**. OK.

Mr. **Singleton**. That's correct.

Mr. **Weiss**. But Justice is not bound to take any action in cases referred to it by your office. Is that correct?

Mr. **Singleton**. Justice has prosecutorial discretion, as we stated earlier.

Mr. **Weiss**. Now, how many of the cases referred to Justice by OCR have resulted in litigation filed by the Justice Department?

Mr. **Singleton**. Well, there again, Mr. Chairman, without having to check records, I don't know.

Mr. **Weiss**. Well, our understanding is that it was probably about three cases that have been initiated for litigation.

Mr. **Singleton**. Does that include settlements, cases that Justice may have settled, as well, or just litigation——

Mr. **Weiss**. Cases for litigation.

Mr. **Singleton**. All right.

Mr. **Weiss**. Litigation.

The next question is, how many of the cases have been declined by the Justice Department and returned to the Department of Education?

Mr. **Singleton**. I believe the number is three or four.

Mr. **Weiss**. Our information is that it is at least five but that——

Mr. SINGLETON. To OCR?

Mr. WEISS. Yes.

Mr. SINGLETON. No, I think that that may not be correct. One of the cases I think you are referring to was sent to OSERS for action.

Mr. WEISS. OK. Anyhow, somewhere within that range of three to five, you say.

Is the Justice Department bound by any timeframes in making a decision on referrals from OCR?

Mr. SINGLETON. Not that I am aware of, no.

Mr. WEISS. Then the Justice Department can take as long as it wants in reaching a decision on these cases. Is that right?

Mr. SINGLETON. There are no timeframes, Mr. Chairman, on the Justice Department as far as I know in terms of when it decides to do something with a particular case.

Mr. WEISS. OK. But that's not the case as far as you are concerned. The Office for Civil Rights is mandated to take action within certain timeframes by the *Adams* order. Is that right?

Mr. SINGLETON. That is correct. That is right.

Mr. WEISS. OK.

So, if OCR did not refer those 23 cases to the Justice Department, would you have been required by the court order to have taken some type of enforcement action by now?

Mr. SINGLETON. Yes, for sure.

Mr. WEISS. Have any of the cases referred to the Department of Justice been there with no action taken for more than 2 years?

Mr. SINGLETON. With no litigation initiated?

Mr. WEISS. That's right.

Mr. SINGLETON. I suspect that may be the case, yes, with some of them.

Mr. WEISS. In most of the cases, right?

Mr. SINGLETON. Well, I don't know about most of the cases, Mr. Chairman. If you have something that indicates that and states so, you know, and I can agree with it or not, if you will show me it. But I don't know. I think that they are looking at some of these. Some of them they have settled. Some of them they have taken to litigation. I don't know exactly what the——

Mr. WEISS. Do you inquire of Justice from time to time as to what action is being taken on these cases?

Mr. SINGLETON. Me personally? No. My staff, though, does.

Mr. WEISS. How frequently does your staff make those inquiries?

Mr. SINGLETON. I don't know, Mr. Chairman.

Mr. WEISS. Who on your staff makes those inquiries?

Mr. SINGLETON. It would probably be my Service Director or, more than likely, the Division Director for Enforcement.

Mr. WEISS. But you don't know?

Mr. SINGLETON. Specifically——

Mr. WEISS. Yes.

Mr. SINGLETON [continuing]. Who would make that?

Mr. WEISS. Right.

Mr. SINGLETON. No.

Mr. WEISS. Since 1977, OCR has found on three separate occasions that school districts in Dillon County, SC, are in violation of title VI. You referred the Dillon No. 2 case to the Justice Department on June 23, 1983. Do you know what Justice did with that case?

Mr. SINGLETON. Yes. Dillon was one of the cases that they sent back to us.

Mr. WEISS. Do you remember when that was?

Mr. SINGLETON. No, I don't.

Mr. WEISS. It was on May 24, 1984.

Has OCR reversed its findings that the district is in violation of title VI in that case?

Mr. SINGLETON. No, we have not.

Mr. WEISS. In the almost 16 months that have passed since Justice sent back the case, what enforcement action has been taken against Dillon County in the Dillon 2 matter?

Mr. SINGLETON. We are in the process of instituting an administrative enforcement action against Dillon 2.

Mr. WEISS. When will that be undertaken?

Mr. SINGLETON. Well, as soon as we can send out the notice of opportunity for hearing and an ALJ is assigned to the case and a date set that the parties can agree to.

Mr. WEISS. Why hasn't OCR moved sooner to correct the violations it found in Dillon County?

Mr. SINGLETON. Well, we did move on the case, Mr. Chairman. Remember, this case was languishing for years. We took action on it, sent it to Justice for enforcement. Justice didn't want to do anything with it, for whatever reason in view of their prosecutorial discretion. They sent it back to us. We reviewed it, and we determined to take it to administrative enforcement.

Mr. WEISS. Sixteen months after it was returned to you.

Mr. SINGLETON. Yes.

Mr. WEISS. Right. And it was referred in the first instance to Justice because the time for taking action was at the point of lapsing under the *Adams* rule. Is that right?

Mr. SINGLETON. Well, that wasn't my fault, Mr. Chairman. That was the previous administration's fault for leaving that case languishing all that time. I got in there and did something with it. I sent it to Justice for enforcement, as I can do under the law. Justice declined it under the prosecutorial authority that they have. And now I am taking administrative enforcement action.

Mr. WEISS. Sixteen months after the fact, after it has been returned to you.

Mr. SINGLETON. There is no timeframe, Mr. Chairman, on when, how long it takes us to get the enforcement action together once a case is sent back from Justice. We took enforcement action when we sent it to Justice in the first instance.

Mr. WEISS. You sent it to Justice because otherwise you would have had to start enforcement. You were running into a deadline.

Mr. SINGLETON. No, that's not true.

Mr. WEISS. You just said that it was true.

Mr. SINGLETON. That's not—Mr. Chairman, you know, you make it sound as if there is some grand conspiracy here. You know, I have to submit that I really take offense and umbrage at that sort of suggestion. I would never be party to anything that would avoid the following and complete compliance with our civil rights laws. Otherwise, I would not be sitting in this chair.

We have taken quite a few enforcement actions. We have initiated them. You know, we didn't have to comply. That is to say, we—no, let me clarify that.

We complied with the order, but it's also very possible that we could have failed to comply with the order. That is to say it is possible that, we could not have done everything the court wanted us to do by the dates that they had given us, but we did. We did it all.

Mr. **Weiss**. Well, what you did——

Mr. **Singleton**. And——

Mr. **Weiss** [continuing]. Let me——

Mr. **Singleton**. Now, wait 1 minute. Let me finish if I may. I beg the indulgence of the Chair just to have a few more minutes——

Mr. **Weiss**. Mr. Singleton, you go right ahead. I thought I had been more than generous——

Mr. **Singleton**. Thank you.

Mr. **Weiss** [continuing]. In allowing you to expound to your heart's content.

Mr. **Singleton**. I appreciate the chairman's largess in that matter.

I would just like to say that we have two avenues open to us for enforcement. One is to initiate administrative enforcement action. The other is to send it to Justice. And we did both. We did both. And when Justice declined to take this one, then we have now initiated administrative enforcement proceedings, or will very, very shortly as soon as the staff work can be completed.

Mr. **Weiss**. Just to recap the testimony in regard to this particular case, it was part of the package of cases that was sent in 1983 to Justice because, as you said, the time was running close to expiring under the *Adams* rule. Twenty cases were sent in 1983. Justice decides after 1 year that it doesn't want to exercise prosecutorial action in this case, and sends it back to you. Sixteen months after the fact, you tell us that you are in the process of preparing for administrative enforcement action at this point.

Mr. **Singleton**. Right. The staff is right now preparing a notice of opportunity for hearing on this case.

Mr. **Weiss**. OK.

Mr. **Singleton**. I hope.

Well, you know, I have been proven wrong before by my staff. They tell me that they are working on it. I gave them the direction to do it, so.

Mr. **Weiss**. Well, I would assume that with the kind of outstanding management practices that are ongoing in your agency——

Mr. **Singleton**. Absolutely.

Mr. **Weiss** [continuing]. That you could assure us absolutely what was going to be happening when.

Mr. **Singleton**. Absolutely. But, boy, I will tell you, I have been embarrassed before this subcommittee once already on what my staff has advised me, so.

Mr. **Weiss**. On June 23, 1983, OCR referred a title IX case involving Anna-Jonesboro Community High School, IL, to the Justice Department for enforcement action. Your referral letter noted that OCR had found the school to be in violation of title IX because sex was a factor in demoting a school employee. How did the Justice Department handle that case?

Mr. SINGLETON. Anna-Jonesboro was another one, Mr. Chairman. As you know, that was sent back to OCR.

Mr. WEISS. Now, was the violation found by OCR in that case corrected after Justice declined to take any action?

Mr. SINGLETON. I don't know, Mr. Chairman.

Mr. WEISS. Well now, would you disagree if I told you that in fact it had not been corrected?

Mr. SINGLETON. What do you mean by corrected, that the institution continued to discriminate against the woman? Is that what you're talking about, or whether or not any administrative enforcement action or any type of enforcement action had been taken in the case?

Mr. WEISS. Whether the matter in fact had been settled or taken to enforcement action.

Do you believe that you have no responsibility to seek corrective action when you find a violation of law simply because the Justice Department declines to take any action? Does your responsibility end if Justice says, we're not going to exercise prosecutorial action in this one?

Mr. SINGLETON. Once I refer a case to the Department of Justice, the case is closed for OCR purposes. If Justice declines to take the case, we have looked at this question in terms of what OCR's responsibility may be. It has been analyzed by my legal staff; and my staff is of the view now that we have to take some action——

Mr. WEISS. Right.

Mr. SINGLETON [continuing]. If Justice should decline.

Mr. WEISS. OK.

On June 23, 1983, OCR referred a——

Mr. CONYERS. Excuse me, Mr. Chairman. Could you ask the reporter to repeat the answer that was just given? I am not sure if I understood it: What happens if Justice declines?

Mr. WEISS. He said that he is of the opinion now that, if Justice refuses or declines to take action, that it is now their judgment that they, that is OCR, has to take action.

Isn't that correct, Mr. Singleton?

Mr. SINGLETON. That is correct.

Mr. WEISS. On June 23, 1983, OCR referred a title IX case involving the Dayton public schools to the Department of Justice for enforcement. What action did the Justice Department take in response to that referral?

Mr. SINGLETON. Again, that was another one that they declined, Mr. Chairman. And the other one was Malcolm King, I believe.

Mr. WEISS. OK. Now, did OCR take further enforcement action against Dayton in that case?

Mr. SINGLETON. To date, no, we have not. We are working on it. I had my staff look at not only this case, Mr. Chairman, but all of the cases that Justice sent back to OCR. Dillon, you know, that's in the hopper.

Mr. WEISS. Right.

Mr. SINGLETON. But these other three, I had my legal staff reexamine those cases to see whether they would be appropriate for us to initiate administrative enforcement proceedings. And the staff has advised that we send those cases back to the regions for some additional fact finding and some additional analysis before we make final determination on going forward with them.

Mr. **Weiss**. Well now, the matter was referred, the Dayton matter was referred on June 23, 1983.

Mr. **Singleton**. Yes.

Mr. **Weiss**. On August 9, 1983, Justice informed OCR that it would be taking no action. On November 3, 1983, the OCR Policy and Enforcement Service recommended that OCR pursue administrative enforcement against Dayton.

Now, as of this moment, in spite of that recommendation, you still have not taken action? Is that the idea?

Mr. **Singleton**. The recent analysis done by the staff indicated that we needed to get some additional facts and some additional analysis of the law, if I am not mistaken, in that case as well as the other two. And if we have not already—I can't recall whether we have sent the instructions to the regions to do that now or whether the staff is in the process of working that up, but that is the thrust of my orders on that.

Mr. **Weiss**. That's 25 months since the matter was returned by Justice and 22 months since your own Office of Policy and Enforcement recommended that action be taken. And you're still analyzing whether in fact action ought to be taken?

Mr. **Singleton**. Well, that's what my legal staff has advised me that we need to do in those three cases. We need to get some additional work done on them before we can move them.

Mr. **Conyers**. Mr. Chairman, could you ask the witness who on his legal staff advised him that?

Mr. **Weiss**. You heard the question Mr. Conyers put to you, please.

Mr. **Singleton**. I believe it was the service, the memo was from the Service Director. The way the memos would flow would be from the head of the service to me. There would be individual staff attorneys working on it, of course. And then it would be reviewed by branch chiefs and division directors, and so forth, as it comes up.

Mr. **Conyers**. So, would it be possible for the witness to furnish the name, Mr. Chairman?

Mr. **Weiss**. Do you have a name for the person who made that recommendation?

Mr. **Singleton**. Well, if the gentleman wanted the person's name, he could have pointedly asked that. The Service Director's name is Mr. Fred Cioffi.

Mr. **Conyers**. Thank you, Mr. Chairman.

Mr. **Weiss**. And Mr. Cioffi made the recommendation that the matter be delayed or that action be taken?

Mr. **Singleton**. No, no, not that the matter be delayed but that we get some additional information on this before we proceed.

Mr. **Weiss**. When did he make that recommendation?

Mr. **Singleton**. Gee, I think a couple of weeks ago or so, a week ago. I sent them—I asked about a month ago, I think it was now, for the staff to give me an analysis of those cases and to reexamine in view of the passage of time; see if we could move them at this point, what our response ought to be. And they advised me that we should get some additional work done on them before we——

Mr. **Weiss**. Is any of this communication in writing, do you know?

Mr. **Singleton**. My assignment to them is in writing. And I am sure the response is also in writing.

Mr. **Weiss**. Would you submit to the subcommittee for our records any exchange of correspondence in regard to the *Dayton* case?

Mr. **Singleton**. Yes. I think that all three of those cases are together, but I will supply what we have on that.

[See appendix, p. 307.]

Mr. **Weiss**. Do you believe that the Federal Government should not pursue enforcement cases involving individuals who have been discriminated against?

Mr. **Singleton**. Of course not. I mean, the Federal Government has to pursue those kinds of matters, sure.

Mr. **Weiss**. In its declination letter in the *Dayton* case, the Department of Justice contended that the dismissal of the complainant's private law suit tainted future opportunities for enforcement. According to OCR's files, the private suit involved title VII violations, not title IX. Why would dismissal of a suit involving title VII jeopardize enforcement of title IX? It doesn't really, does it?

Mr. **Singleton**. I don't know what the basis of that is. I don't know. I am not agreeing or disagreeing with it. I just don't have any opinion on it.

Mr. **Weiss**. You haven't found that the title IX violation in that case has been corrected, is that right?

Mr. **Singleton**. I don't know. This is part of the additional fact finding that will need to be done on this.

Mr. **Weiss**. Again, I must say, Mr. Singleton, that it seems to me that the length of delay in this matter since Justice returned the case to you should appear to you to be unreasonable.

Mr. **Conyers**. Excuse me, Mr. Chairman.

Mr. **Weiss**. Mr. Conyers.

Let me turn it over to you. If you have any questions, please ask.

Mr. **Conyers**. Well, I would rather just ask you this particular question. Could you ask the witness to determine whether there is a conflict or not with regard to bringing them under different sections of the law, the question on which you were probing. In other words, if he doesn't have an opinion, I would like him to get one.

Mr. **Singleton**. Well, Mr. Chairman——

Mr. **Conyers**. I'm not talking to the witness, Mr. Chairman.

Mr. **Weiss**. Right, right.

Consider that I've asked you the question, OK?

Mr. **Singleton**. All right.

The point is that we do not enforce title VII. That's the EEOC's function. We do have some employment responsibility under title IX and under title VI if it affects beneficiaries, and now section 504. But I don't know what, you know, the Justice opinion is on that. I have not seen it. I don't know what they're referring to there. But we would have to take a look at that.

One of the things, you know, I might add here, too, Mr. Chairman, to keep in mind is that in the intervening period of time *Grove City* came down. You know, *Grove City* had quite an impact on our jurisdiction in a number of these cases. That is something that we have to take into account here, too, in terms of examining this case to see whether or not in fact we would retain jurisdiction over it in view of the program specificity requirements of *Grove City*.

Mr. **Conyers**. Mr. Chairman.

Mr. **Weiss**. Yes.

Mr. **Conyers**. Maybe I'll ask the witness this question.

Mr. **Weiss**. Mr. Conyers.

Mr. **Conyers**. Witness, did *Grove City* impact some of the cases under your jurisdiction?

Mr. **Singleton**. Yes. *Grove City* without a doubt would impact, would have an impact on a number of them.

Mr. **Conyers**. Which ones?

Mr. **Singleton**. I don't know which ones, sitting here, Mr. Conyers. I could get that information for you and supply it for the record or to you personally if you would like that.

And I would also like a further clarification as to which cases you are specifically referring to so that I could narrow the staff——

Mr. **Conyers**. Well, you do the best you can. If it's inadequate, I'll ask you for some more.

You said that the cases in our jurisdiction are impacted by *Grove City*. I want to know which ones. Now you want me to give you some detail.

Mr. **Singleton**. Well, you used——

Mr. **Conyers**. I don't know which——

Mr. **Singleton** [continuing]. A very general description of cases under my jurisdiction, and that's quite a few. I was chatting with the chairman, if you will, about the cases that were referred back from Justice, which constitute three or four cases. Now, if that's what the gentleman wants, I would certainly be more than happy to supply that. If he wants something a little more than that, I would be happy to do that as well. I only need the clarification as to what he is talking about.

Mr. **Conyers**. Clear?

Mr. **Singleton**. I will——

Mr. **Conyers**. Is it clear?

Mr. **Singleton**. No, it's not clear. But I will supply to you the analysis with respect to the cases that were referred back to Justice from us, if that's good enough.

Tell me what you want. I would be happy to give you whatever you——

Mr. **Weiss**. Mr. Singleton, if I may. You volunteered, not in response to a specific question, but in the course of your response to me, that *Grove City* has in fact impacted a number of your cases. What Mr. Conyers is asking, since you volunteered that, is if you would supply information to the subcommittee as to which cases that you are talking about *Grove City* has impacted. It's simple enough.

Mr. **Conyers**. Thank you, Mr. Chairman.

Mr. **Weiss**. Right? And you'll supply that information to the subcommittee?

Mr. **Singleton**. Mr. Chairman, I will certainly do that. I will send you a letter as to where our understanding is on that, because I don't really want to get into one of these things about what I promised to do and what I did. I want to comply with whatever the subcommittee's requests are.

Mr. **Weiss**. Good.

Mr. **Singleton**. I just need clarification as to what it is you're looking for, that's all.

Mr. **Weiss**. You were the one who raised the issue.

Mr. **Singleton**. No, no, I raised the issue——

Mr. **Weiss**. Right.

Mr. **Singleton**. I just wanted to bring it to your attention. You were wondering why it took all of this time for us to look at these three cases. And I said, you know, Mr. Chairman, it just occurred to me. *Grove City* came down, too, and that's another reason why, you know, it may have taken——

Mr. **Weiss**. OK. And if you will tell us which cases *Grove City* impacted, we would appreciate it. OK?

[See appendix, p. 207.]

Mr. **Weiss**. Now, in a section 504 case involving the Illinois State Board of Education, OCR found that the State failed to insure a free and appropriate public education to residents of mental health facilities. In June 1983, OCR referred the case to the Department of Justice.

Has the Department of Justice acted against the State of Illinois in that matter?

Mr. **Singleton**. ISBE cases, no, I think that was the one they sent back to OSERS.

Mr. **Weiss**. OK.

Now, in January 1985, the Department of Education general counsel informed the Assistant Secretary for Special Education and Rehabilitative Services that OCR's findings were correct and that the practices of the Illinois Board of Education—quote—"constitute a violation of EHA-B as well as section 504," close quote. This memorandum notes that in addition to referring the case to the Department of Justice, the Education Department also has the option of voiding certain Federal grant awards to the State.

Has in fact the Department sought to void grant awards to enforce the law?

Mr. **Singleton**. Mr. Chairman, I don't know what OSERS has done with that case. I would respectfully request that the chairman direct that question to the Assistant Secretary for OSERS. I don't know what they're doing with it.

Mr. **Weiss**. So, you have no information as to what the department is doing in that matter?

Mr. **Singleton**. Not personally, no. I am sure someone on staff may, but I don't.

Mr. **Weiss**. Would you, again, try to get information for us and submit that information to the subcommittee for the record?

[See appendix, p. 349.]

Mr. **Weiss**. My understanding is that, although the Department was aware of your findings, it has consistently approved grant awards to the State. Do you have any reason to disagree with that?

Mr. **Singleton**. No.

Mr. **Weiss**. Since January 1, 1981, OCR issued notices of opportunity for hearing in 27 cases. Three of the notices were issued in 1982. One was issued in 1983. And one was issued in 1985. The remaining 22 notices were issued in March 1984. Why were so many notices issued in March 1984? Is that again an *Adams* due date for enforcement?

Mr. SINGLETON. Yes. March 1984 would have been the absolute deadline that the court gave us to clean up all of those cases.

Mr. WEISS. Now, why doesn't more enforcement action occur at times other than *Adams* due dates?

Mr. SINGLETON. Well, you see, Mr. Chairman, you have to put that into perspective. What we were talking about here was a great number of cases that had been left over for years. Some of these cases dated back to 1977, 1978, 1979, during the previous administration. When the court imposed the mandate that these cases be closed by a certain date, we complied and that's why you had a lot of enforcement actions.

You know, usually what happens is that cases with the more intractable problems, if you will, are the ones that tend to linger. That particularly was the case with the former administration. So, a lot of these cases were hanging around, and they were intractable problems. We had to make the cut on them. So, they did go to enforcement.

Mr. WEISS. Let me at this point ask my colleagues if they have questions. Mr. Rowland? Mr. Conyers, shall I continue? Do you have any questions?

Mr. CONYERS. In a few minutes.

Mr. WEISS. In March 1984, OCR brought an administrative enforcement action against the Petaluma City schools which OCR had found to be in violation of title IX in its hiring practices. Eventually the Petaluma schools offered a settlement which OCR accepted. The settlement proposed by the school district, not by OCR, called for a procedure to simply ensure that women are included in the interview process used by the district. On May 31, 1985, you personally intervened and had the interview assurance removed from the settlement.

Why did you "weaken" a settlement that the school district itself proposed?

Mr. SINGLETON. Well, I don't know that I would agree with the characterization "weaken." I don't recall the specific provision at this point. I do recall generally that particular matter.

But if I am not mistaken, I believe that what they had set up was a cumbersome procedure that it seemed to me, as I recall it now, had a quota overtone to it or something. I mean, you had some sort of formula that it seemed to me that was unworkable. My view was that I thought that all they needed to do to take care of this problem was if they did not get qualified numbers of women, a good number of women, was to go out and expand the pool from which they would draw upon to ensure that they had qualified numbers of women to review. In other words, do more recruitment rather than set specific numbers as to, you know, percentages as to who was supposed to be——

Mr. WEISS. Mr. Singleton, I am afraid that your recollection in this one is faulty.

Mr. SINGLETON. Was that the issue——

Mr. WEISS. No, no, there was no question of quotas. The memorandum deleting the provision had you stating—and I quote—"I find these provisions to be overly complicated, and they give the appearance of an unnecessary intrusion by OCR into the administration of the school district," close quote.

Now, here is a provision for simply including women in the interview process, suggested by the school district itself. You then find that that is intrusive. I don't understand the thinking behind that. It had nothing to do with quotas or numbers.

That one escapes me. I don't know why you would have done that.

Do you have anything further to add to it?

Mr. SINGLETON. No. I feel I am at a distinct disadvantange, because I don't recall the——

Mr. WEISS. All right, would you do us a favor? Refresh your recollection and then submit your response to us on that one in writing, OK? So, you will have the benefit of reviewing your records and your memo and your thinking on it.

[See appendix, p. 354.]

Mr. WEISS. Are recipients of Federal education funds required to sign assurances of compliance with civil rights laws?

Mr. SINGLETON. Well, I think that as a general matter we do require assurances, yes.

Mr. WEISS. Right. Now, after an investigation of the Royal Independent School District in Waller County, TX, which had previously been found to be in violation of section 504, OCR found the district refused to submit a statement of assurance to the Department of Education that it would not violate section 504.

What enforcement action has OCR taken against that school district?

Mr. SINGLETON. None.

Mr. WEISS. Why not?

Mr. SINGLETON. Why should we? In my judgment, not going after a school district in this instance, where there has been no allegation of any discrimination, only a failure to sign an assurance of compliance form, does not affect our jurisdiction in the least. By going after them, all I am doing then is expending scarce resources trying to prove a point. I mean, that's the same thing that happened in Grove City, where you had an institution that hadn't discriminated on the basis of sex or race or handicapping condition. The only failure was that it failed to sign an assurance of compliance form.

The bottom line here, though, is that we did not have jurisdiction over Royal anywhere, so we couldn't have instituted any enforcement action if we wanted to.

Mr. WEISS. Listen to the facts again. Royal Independent School District in Waller County had previously been found to be in violation of section 504. OK? And then OCR found that the district refused to submit a statement of assurance to the Department of Education that it would not violate section 504 in the future.

I asked you what action has OCR taken against the school district for doing it, and you say, we have no indication that they were in violation. You do have an indication that they had been in violation of that very section. So, why would you not insist——

Mr. SINGLETON. We didn't have jurisdiction over them.

Mr. WEISS. Why not?

Mr. **Singleton**. We didn't have the funding there to establish jurisdiction.

Mr. **Conyers**. Wait a minute, Mr. Chairman.

Mr. **Weiss**. Mr. Conyers?

Mr. **Conyers**. You say you didn't have the funding?

Mr. **Singleton**. Yes.

Mr. **Conyers**. Does that mean that you weren't able to secure the resources because you didn't have the money?

Mr. **Singleton**. No, no; understand, we cannot investigate a complaint unless the school district receives Education Department funds. And what we found later was that Royal did not receive any Education Department funds which would give us the jurisdiction——

Mr. **Weiss**. Mr. Singleton, before you go on, here is the memo dated August 17, 1984, to Taylor D. August, regional civil rights director, from you, subject: Royal ISD. In the second paragraph you say:

> A letter should be drafted to Royal stating the above. The letter should emphasize that OCR has determined that Royal is a recipient, that Royal must comply with the civil rights statutes, that it is subject to our jurisdiction, and that in the event an allegation of discrimination is made against it, the office will take all action necessary to assert our jurisdiction and conduct a full investigation.

Mr. **Singleton**. That's right.

Mr. **Weiss**. So, why——

Mr. **Singleton**. And at that time——

Mr. **Weiss**. Why are you saying that there's no jurisdiction?

Mr. **Singleton**. At that time, that's—at that time it was our understanding that they were a recipient. And if in fact they were, that statement is correct; that memo is correct. But what I am telling you is that what we subsequently found was that Royal is in fact not a recipient.

Mr. **Weiss**. Would you submit to us again for the record documentation of that? Do you have any documentation which——

Mr. **Singleton**. I'm sure we do. Yes, we will submit it to you, no problem.

Mr. **Weiss**. That they were not receiving——

Mr. **Singleton**. That's right. At the time this was going on, they were not——

[See appendix, p. 355.]

Mr. **Weiss**. Are they receiving funds currently?

Mr. **Singleton**. Currently?

Mr. **Weiss**. Yes.

Mr. **Singleton**. That I don't know.

Mr. **Weiss**. Had you ever checked subsequently whether in fact they were receiving funds?

Mr. **Singleton**. Well, that's how this information came up. I mean, it was subsequent to this memorandum, which was a year ago.

I didn't check before I came in here, if that's what the chairman is asking me, no.

Mr. **Weiss**. Does anybody on your staff, can anybody on your staff tell us at this point whether in fact there is a current determination as to whether in fact Royal receives Federal funds or not?

Mr. **Singleton**. As of this day?

Mr. **Weiss**. Yes.

Mr. **Singleton**. We will find that out for the chairman and report it back to the subcommittee.

[See appendix, p. 355.]

Mr. **Conyers**. Mr. Chairman.

Mr. **Weiss**. Mr. Conyers.

Mr. **Conyers**. Maybe I have to ask the witness this question.

Are you saying you don't know whether Royal is or is not receiving Federal funds?

Mr. **Singleton**. I think, Mr. Conyers, what I just testified to is that I——

Mr. **Conyers**. I don't care what you testified. I am now asking you a question.

Mr. **Singleton**. What I testified to——

Mr. **Conyers**. Please respond to the question I have posed.

Mr. **Singleton** [continuing]. Was that I did not know whether Royal this day was receiving Federal funds.

Mr. **Conyers**. Just a moment, witness.

Mr. **Singleton**. What I said earlier——

Mr. **Conyers**. Just a moment, witness.

Mr. **Singleton**. What I said earlier, Mr. Conyers——

Mr. **Conyers**. Just a moment, witness.

Mr. **Singleton** [continuing]. Was that we subsequently——

Mr. **Conyers**. Just a moment, witness.

Mr. **Singleton** [continuing]. Found out that they did not receive the funds.

Mr. **Conyers**. Mr. Witness, when I ask you to suspend for a moment, please cooperate with me. You are not running my questions. Now just a moment, please; stop.

Mr. **Singleton**. I have stopped, Mr. Conyers. What is your question, sir?

Mr. **Conyers**. The question is, sir, do you know right this moment whether or not Royal is receiving Federal funds or not?

Mr. **Singleton**. Mr. Conyers, I do not know whether Royal Independent School District is receiving Federal funds this day. No. I do not know that. I promised the chairman I would go back and check——

Mr. **Conyers**. Thank you very much.

Mr. **Weiss**. Mr. Singleton, I think that, again, your recollection may be playing games with you.

Mr. **Singleton**. Perhaps, Mr. Chairman——

Mr. **Weiss**. If you read this memo, a copy of this memo, you will find that the concern that you seemed to have was that they were not receiving funds. You seemed to be persuaded that in fact they are a recipient. The problem you seemed to have was that there was in fact no complainant and that, because there was no complainant, that you didn't want to allocate resources to securing the result alone of getting them to sign a statement that they would in fact assure the Department of adherence that it would not violate section 504.

Does that refresh your recollection at all? It's not that you didn't have jurisdiction——

Mr. **Singleton**. No, no; you know, I admit to the chairman that at the time that the memo was drafted, it was our impression or our understanding that that school district was a recipient. I was just stating——

Mr. WEISS. Right.

Mr. SINGLETON [continuing]. Though, for the record that subsequently to that, we found out that they weren't at that point in time when we were dealing with them. But at that time, when we thought that they were recipients, it was my view that, based upon all of the facts there—and I have to go back and refresh my recollection on that particular case file—that all that we had here was a *Grove City* type problem in the sense that we had an institution that was failing to sign the assurance of compliance form. That doesn't affect our jurisdiction in the slightest. Whether they agree to or not to, we have jurisdiction over them. And if any complaint comes in, as long as they're a recipient, or we want to institute a compliance review, we can go in there, whether they have instituted or have signed an assurance of compliance form or not.

So, my judgment was to take them to enforcement for failing to sign the assurance of compliance form did not seem to me to be the best use of our resources, when we clearly had jurisdiction over any problem that might arise there.

Mr. WEISS. Well, but——

Mr. CONYERS. Mr. Chairman.

Mr. WEISS. Mr. Conyers.

Mr. CONYERS. May I ask the witness a question?

Mr. WEISS. Please.

Mr. CONYERS. On this memorandum that came from you to Taylor August about Royal, it has this sentence: "While I am convinced that the facts establish Royal SID as a recipient"—and it goes on. Is there any way we can determine what those facts were?

Mr. SINGLETON. I don't know at this point. Probably so. There should be some documentation on it somewhere, some sort of Federal financial assistance analysis that was done.

What is the date on that again?

Mr. CONYERS. August 17, 1984.

Mr. SINGLETON. Eighty-four? There should be.

Mr. CONYERS. Well——

Mr. SINGLETON. Would you like that, if we can establish it? Would you like to have the documentation?

Mr. CONYERS. I would like it very much. Thank you.

[See appendix, p. 355.]

Mr. WEISS. In 1983, OCR found that the Crisp County, GA, School District had violated title VI by using ability grouping to assign students. Did OCR take enforcement action against Crisp County?

Mr. SINGLETON. No, I don't believe so, Mr. Chairman. I think that that may have been a case that—I think that case was dismissed.

Mr. WEISS. You don't recollect? Do you know if Crisp County corrected the title VI violation?

Mr. SINGLETON. No, no. I think there was—there was a problem with that particular case. That was a transition case, if I am not mistaken, as we call it, one of those cases that we had to resolve by the court order.

To avoid litigation that is going on in a Federal court proceeding and OCR engaging in administrative enforcement proceeding or another investigation where the issues involve the same thing simultaneously, we are permitted to toll the case. That is to say, when there is a Federal court action involved or another court of similar jurisdiction, we can toll the case, our investigation, pending the outcome of the Federal court action to determine whether or not all of the issues that were raised in the complaint have been resolved.

Now, that is provided for under the court order. That is with regular order cases, if I can use that term. Crisp County was a transition case, if I am not mistaken. I believe the advice from my legal staff at the time was that transition cases were not subject to the tolling provision in the event that there was a parallel court action going on. So, the advice was that in those cases where we had parallel litigation, we had to close that case pending the outcome of the Federal court action and make a determination then whether that court action had dealt with all of the issues that were raised in the complaint.

Mr. Weiss. And what is its status currently?

Mr. Singleton. I believe it's still closed. I don't know for sure.

Mr. Weiss. Do you know if Crisp County corrected the title VI violations?

Mr. Singleton. I don't know, Mr. Chairman. Again, there is a Federal court case involving the same issues. And I don't know if that court case has subsequently been resolved and those issues have been settled or not. I don't know. I would have to——

Mr. Weiss. Do you know if anybody in your office has been monitoring the case and following it up?

Mr. Singleton. Yes, I would imagine the—it would be the responsibility of the particular region. Georgia is region 4. I would imagine that they were monitoring that case.

Mr. Weiss. Could you again submit information to the subcommittee as to what the status of that case——

Mr. Singleton. Sure.

Mr. Weiss [continuing]. Whether it's being monitored, whether the violations have been corrected or not?

Mr. Singleton. Sure. I will be happy to.

[See appendix, p. 208.]

Mr. Weiss. Do you believe that OCR has the responsibility to conduct compliance reviews where it has evidence that discrimination exists in public school systems?

Mr. Singleton. Yes.

Mr. Weiss. OK.

On June 6, 1983, OCR issued a notice of opportunity for hearing against William Patterson College of New Jersey. OCR had found that the school failed to provide a sign language interpreter to a deaf student. However, the complainant refused to testify, and OCR moved to dismiss the case citing good reason.

Is that correct?

Mr. Singleton. I think that that's correct, Mr. Chairman. Again, that has been some time ago, and I have not refreshed my recollection of that. But that sounds about right.

Mr. WEISS. Now, OCR also found that the denial of services to deaf students appeared to be a statewide higher education policy. Therefore, your staff recommended on April 23, 1984, that a compliance review be conducted of all State colleges in New Jersey. Has this compliance review been conducted?

Mr. SINGLETON. No, it has not. It was determined that it was unnecessary to do that.

What the chairman may not be aware of is that the—I believe it was the regional office which did some followup work on that to find that that was not a statewide problem. And so, consequently, it was not necessary to do that compliance review.

Now, we do have some individual cases involving, I think, a similar problem with some schools in New Jersey. I think one of them may be in enforcement.

We had four cases. Three of them were settled, and one of them we are considering enforcement action on. But it was not a systemic, statewide, if you will, problem.

Mr. WEISS. How would you have determined that without undertaking the compliance review?

Mr. SINGLETON. The regional office did some additional work on it. I don't know exactly what they did, whether they did in fact do something short of a compliance review to ascertain what the policies and practices were of the various institutions involved.

Mr. WEISS. We have this memo dated April 23, 1984, addressed to you from Mr. Antonio J. Califa, and the subject is whether to proceed in the William Patterson College case. It addresses the specific individual case. He says: "Assuming that the case is dismissed without prejudice because that particular student failed to come forward, I recommend that OCR commence compliance reviews of all public colleges in New Jersey. The compliance reviews would look only at the colleges' policies and preparedness to provide sign language interpreters to deaf students in light of the partial services provided by the vocation rehabilitation agencies," period, close quote.

Tell me what kind of documentation you have for other work that may have been done at the region to obviate the need for undertaking the compliance review that was recommended by your director for policy and enforcement service?

Mr. SINGLETON. Well, first of all, I don't know that it was necessary to do that type of compliance review. I mean, that was his recommendation. That is not to say that that was the action that we had to take in that particular instance. I don't know what documentation there may be on that from the regional office. I would have to check, Mr. Chairman. I don't know what they did there. But it has come to my attention that what we subsequently found out was that it wasn't a problem. I was concerned about it, the New Jersey situation——

Mr. WEISS. Would you submit to us whatever——

Mr. SINGLETON. Whatever——

Mr. WEISS. I can't imagine that you would find out that it was not a problem without something being sent to you in writing, or to somebody in writing about that issue, and your making or somebody in your office making a deliberate judgment as to whether in fact to proceed with a compliance review or not. It would not just be, I assume, an offhand, off-the-record determination.

Mr. SINGLETON. Well, first of all, Mr. Chairman, there was no decision to do a statewide compliance review. Again, what you have there, are staff recommendations. That is not necessarily to mean that that is the final judgment on that particular issue.

I can't remember whether I received anything. We may very well have. But I just can't state categorically yes or no that I did. I am sure that we did receive something in writing. But as I said, I will look and supply it to the chairman for the record.

Mr. WEISS. All right. We will wait for whatever information or documentation you can submit.

[See appendix, p. 365.]

Mr. WEISS. Mr. Singleton, in March 1984, OCR found that the Georgia board of regents' test for college graduates was in violation of title VI of the Civil Rights Act of 1964 because students at predominately black colleges failed the test at much higher rates than white students. OCR issued a notice of opportunity for hearing and brought the case before an administrative law judge when the State refused to settle the matter adequately in response to their findings.

On June 22, 1984, OCR moved to dismiss an administrative hearing that OCR had requested in this case. Why?

Mr. SINGLETON. Because the board of regents had agreed to remedy the particular problem that we found there.

Mr. WEISS. Well, OCR had sought to require the State university system to enhance the quality of education in Georgia's traditionally black colleges in the areas examined by the regents' test. Was that part of the settlement?

Mr. SINGLETON. Yes; I believe it was. What we found there, Mr. Chairman, was a situation where black students, particularly black students from traditionally black institutions in Georgia, were failing disproportionately on the regents' test. And the board of regents had committed itself to an appropriate program of remediation at all of these schools.

What we found was these schools at which those students were doing the poorest on the test were in fact receiving the least amount of remediation. So we pointed this out to the State. They agreed to remedy that problem. I think that the settlement we got there was more than adequate to deal with the particular problem.

Mr. WEISS. Well, the settlement apparently hinged on the agreement of the State to pay funds into a developmental plan for testing, not to require the system to enhance the quality of education in Georgia's traditionally black colleges.

Mr. SINGLETON. I don't think that's right, Mr. Chairman. I don't remember the specific elements of that at this point. But, as I recall, the State committed to do a number of things. That was to mandate certain hours of remediation. They established remedial programs at these schools, making it mandatory as far as a course requirement is concerned, that students participate who had failed the exam once. They had agreed to establish some tougher standards in order to bring a number of the students up to par to pass the test.

They also, I think, worked out an arrangement with Control Data, if I am not mistaken, for the acquisition and installation of some computerized equipment for the sake of tutoring purposes for the students.

It was, I thought, quite a good settlement plan that they engaged in.

Mr. WEISS. You know, the administrative law judge in that case was puzzled by the OCR decision to dismiss the case in the settlement. The judge noted that—"All the issues raised by OCR have not necessarily been settled by the plan offered by respondents and accepted by the assistant secretary, contrary to averments made."

Why didn't OCR seek a more complete remedy in that case?

Mr. SINGLETON. Well, I don't know that we needed any more complete remedy. I think the remedy that we sought and the remedy that we got was adequate to deal with the particular problem.

Mr. WEISS. Now, in regard to that case, did you receive a letter from the Department of Justice that criticized OCR for using statistical evidence in establishing violations of law?

Mr. SINGLETON. Not that I'm aware of.

Mr. CONYERS. Mr. Chairman.

Mr. WEISS. Mr. Conyers.

Mr. CONYERS. I want to thank the Chair for yielding to me briefly. I would just like to make a statement before I ask to be excused.

First of all, I think these are incredibly important hearings that are under way. I commend you, Mr. Chairman, for your foresight and dedication in sticking through with what has become a very difficult set of hearings. I want to commend you also on behalf of the members of the Congressional Black Caucus and especially myself, a subcommittee member, who will continue to give you full support in this most important investigation.

I think that what you have done here is put your finger on what may be the biggest problem that we have encountered with civil rights since 1964. I don't mean just recently. I mean ever since we started bringing forward civil rights legislation. And that is the question of enforcement. There has been no more sensitive question in all areas than how we enforce these noble measures that we forge out here in the Halls of Congress. So, this hearing is to me a key one. I want to encourage the chairman and also hope on the record that we will get relevant activities of the Justice Department's Civil Rights Division, which has apparently become the basket in which all cases that OCR is under heat from *Adams* get tossed into. It's sort of like a lateral pass on the football field. And that makes everything OK. We just send it to Justice. And then someday soon, maybe this year even, we'll find out what happens to those cases.

So, this is bringing forward through this hearing a review of the entire enforcement process. I hope Congress will get to voter rights and other very important areas in this way. I don't see anytime soon when we will be closing this probe of the Department of Education.

Now, as I recall it, Mr. Chairman, this witness has made innumerable commitments about producing material. And I presume that these materials have been forthcoming and are forthcoming. I am asking my staff member to check with the committee staff because soon I will ask for, if they are not already scheduled, I will ask for a hearing specifically on the commitments that have been made in the course of the hearing so that we can find out where these matters are. This valuable information that has to come forward is very critical in forming our opinion about where we are in the state of enforcement in the Department of Education.

So, once again, you have the undying gratitude of a lot of people for doing a job that could have been as easily overlooked. There are a lot of things we ought to oversight in the Congress. This is not one of the easier jobs. I wanted just to express the strong feeling of appreciation that I have for you in this undertaking.

Mr. WEISS. I want to thank the gentleman for his comments and for his participation in these hearings, and for the important work that he has been doing not only here but in his own capacity as the chairman of a subcommittee of the Judiciary Committee.

As far as materials which have been requested and which have been promised and which have been delivered, our staff will of course be pleased to work with you and any of the other members in exchanging information and providing information as to what has been made available and what has not been made available.

Mr. CONYERS. Thank you.

Mr. WEISS. Mr. Singleton, on February 10, 1984, you notified your regional directors that the desegregation plan in the Bakersfield, CA, case should be used as guidance in formulating remedies in other cases. Is that correct?

Mr. SINGLETON. Yes.

Mr. WEISS. The Bakersfield plan included a provision which encouraged minority students to transfer to majority schools. The plan also included substantial compensatory education programs to students in racially isolated schools. Is that correct?

Mr. SINGLETON. I think so, yes.

Mr. WEISS. Earlier this year OCR settled a case with the Peoria, IL, school district, which OCR had found to be in violation of title VI as a result of racially isolated schools. Did this settlement in the Peoria case adhere to the Bakersfield guidelines?

Mr. SINGLETON. Well, Mr. Chairman, let's put this thing in perspective now. You know, the Bakersfield case is not a template, if you will, that every single desegregation plan that comes down had to look like. I mean, it was a model. Some plans may have more elements in them than the Bakersfield model; others may have less. I mean, it was a rule of thumb sort of guidance that we—this was the basic approach that we were going to be taking with these kinds of cases.

Mr. WEISS. Now, as a matter of fact, not only did the Peoria settlement not include provisions for minority to majority transfers or compensatory education, but the OCR policy and enforcement service recommended that the Peoria settlement not be accepted without a voluntary minority to majority transfer provision, and without more compensatory education services in the racially isolated minority schools. OCR staff advised you that the plan could not be successful without these components.

Was their recommendation accepted?

Mr. SINGLETON. No, obviously it was not. I mean, I didn't agree with them on that point. I had to make a judgment, Mr. Chairman, on what to do in that particular instance. The school district was very clear that what they were giving us was the best they could do. And they didn't think that anything more than that would work there in the particular circumstances.

I was also being advised by my regional staff. What you're talking about is the advice that I got from the headquarters staff, but I have a regional staff, too, with attorneys, very skilled attorneys who put together a number of these kinds of cases. Their advice to me was that this was a very weak case and that we could likely lose this case if we had to ultimately get into a litigation situation with it.

My view was that we got from them the best plan we could and we would give it a try and see what would happen with it. If it doesn't work, I suspect that at some point down the road we could always go back in and deal with it again. But that was my judgment on that.

Mr. WEISS. This again did not include quotas or numbers. The Bakersfield plan provides for voluntary minority to majority transfer provisions and more compensatory education services. Isn't that correct?

Mr. SINGLETON. Yes, I——

Mr. WEISS. OK, so, this does not have the issue of quotas or numbers or——

Mr. SINGLETON. I didn't mean to imply that, if you got that from what I just said. But they were not willing to go any further than that——

Mr. WEISS. OK.

Mr. SINGLETON [continuing]. For pedagogical reasons.

Mr. WEISS. So that compliance with the Peoria plan, if I understood what you just said correctly, as well as the Bakersfield plan depends upon the districts making good-faith efforts rather than meeting any guidelines of success standards. Is that correct?

Mr. SINGLETON. No, I think that you have to have some element of success or hope for success, Mr. Chairman, built into these things. They had the standards—the commitments that they make have to be reasonable, it seems to me, to have a chance of succeeding. I think that it is more than just good faith.

Mr. WEISS. Does OCR use the good-faith standard in negotiating desegregation plans in all cases now?

Mr. SINGLETON. If you are referring to that position that the Justice Department just recently announced in a case, you know, I am not familiar with that. There are no orders to my staff to do—I mean, we have our internal procedures for dealing with these cases. It may be very similar to what Justice has done, but I don't know that it is down on all fours with whatever the position advocated by Justice was recently.

Mr. WEISS. OCR had brought administrative enforcement action involving a multiple finding against governors of State University and Illinois State Board of Governors of State college and universities. Why were these cases dismissed?

Mr. SINGLETON. I don't know, Mr. Chairman. I am not familiar with those cases. I don't remember those cases.

If they are the ones that I think they are, I think it was a jurisdiction problem again. But I am not certain. I can't remember.

Mr. Weiss. Memorandums from regional attorneys state that OCR has clear jurisdiction in these cases and should reopen them. I wonder if you have had occasion to review those regional attorneys' recommendations and what your decision is.

Mr. Singleton. No, I don't recall seeing any regional attorney recommendations on that. I think that there is some work going on with that, Mr. Chairman, some work done on it. But again, I just don't know.

Mr. Weiss. Would you, again, review your files and please submit a response to us in writing for the record?

Mr. Singleton. Yes, we will do that.

[See appendix, p. 371.]

Mr. Weiss. During an investigation of the Phoenix Union High School District, OCR concluded that the district was in violation of title VI because it had illegally segregated high schools. OCR intended to settle the case by incorporating the district settlement plan into a private litigatory action resulting in the so-called *Castro* order. Is that correct?

Mr. Singleton. Yes, I believe so.

Mr. Weiss. An OCR enforcement memorandum stated that the *Castro* order did not affect all the schools in the district and therefore—quote: "The district with respect to this problem has failed to take sufficient steps toward elimination of racial/ethnic isolation in all parts of the district and remains in violation of title VI," close quote.

If the *Castro* order did not resolve the title VI violation in Phoenix, why was it used as a remedy?

Mr. Singleton. I don't know, Mr. Chairman. I don't recall the specifics of that case or any of the analysis that was done on it. So, I am at a distinct disadvantage, at a loss here to try to answer those kinds of questions for you.

Mr. Weiss. Then you wouldn't know whether the *Castro* order was modified to address all of those concerns?

Mr. Singleton. No, I wouldn't know at this point.

Mr. Weiss. Well, again, would you for the record review your files and submit responses to us?

Mr. Singleton. I will do that, Mr. Chairman.

Mr. Weiss. Thank you.

[See appendix, p. 421.]

Mr. Weiss. In the *Grove City* decision, the Supreme Court required that Grove City College sign an assurance that it would not violate the law in programs where it has received Federal funding such as Pell grants. Has OCR insisted upon and received such an assurance?

Mr. Singleton. I don't think—no, we have not, because I don't think that *Grove City* got any funds. I don't know. I would have to check on that. But I think that there was—there's something recent on that, or several months ago on that. And I think that, as I recall it, *Grove City* got no funds from the department. They weren't certified eligible to get any funds. So, it wasn't necessary for us to do that.

But then again, I——

Mr. **Weiss**. Double check, would you, because, again, while the Court held that they did not have to adhere across the board, that they did have to adhere in those specific instances where they received funds. And so it seems to me that there is a clear indication, if they are receiving funds, for the assurance of nonviolation to be signed. So, would you please check your files to see what is happening in that situation?

Mr. **Singleton**. I will check on that and provide you a response. [See appendix, p. 210.]

Mr. **Weiss**. It should be noted that the Justice Department responded in toto to the questions that we requested of it, that is, of giving us a summarization of the various cases that had been referred by the Office for Civil Rights and what the disposition and status of those cases are, which, it seems to me, should very clearly dispose of the argument that there is some reason why cases pending in this kind of investigation for some reason cannot be discussed or disclosed to this committee, if there was ever any question in anybody's mind as to the validity of that argument.

I should also point out that, although there were assurances made in that letter of July 18, 1985, as to the files held at the Office for Civil Rights concerning those cases which had been referred to the Justice Department, as to the availability of our staff to review them, in fact, that access has not been made. That was, I assume, part of the matter to which Mr. Conyers was referring as to further possible action to be undertaken by this subcommittee.

I would hope that it would not be necessary for further action before all that material in fact is made available to us. In our judgment there is just no question about the right of the subcommittee to have access to the files.

Now, finally, in closing, let me just ask if your staff had discussed the cases with you that we reviewed, that is, the cases that were referred to the Justice Department?

Mr. **Singleton**. Has the staff——

Mr. **Weiss**. Have you had discussions with your staff about those cases?

Mr. **Singleton**. On all of those cases?

Mr. **Weiss**. Yes.

Mr. **Singleton**. No. The only ones that we talked about were the ones that came back. I mean——

Mr. **Weiss**. Right.

Mr. **Singleton**. In preparation for this? Yes.

Mr. Chairman, if I may——

Mr. **Weiss**. Please.

Mr. **Singleton** [continuing]. I would like to state again that it is my position that we are not denying the subcommittee access to those files. We fully recognize the oversight responsibility of this subcommittee and its authority to have access to those documents. My only concern, the only issue that we have been dealing with here for some time was some reasonable assurances for procedures that we might maintain the confidentiality of some of the materials contained in those open case files.

Mr. **Weiss**. Mr. Singleton, just for the record, I want you to know that my staff made a proposal to you which is much more than reasonable. It was suggested that, as to those issues where there is any question about disclosing any of the information or having it come to the subcommittee, that we would have those matters referred to both myself and the ranking minority member, Mr. Walker, and that only if both of us agreed that in fact it was appropriate for the subcommittee to receive that information would we in fact insist on receiving that information. Now, that gives the minority a veto power over it. It couldn't be much more reasonable. I think my staff went overboard in making that proposal, but I am willing to adhere to it.

It just seems to me that, given that kind of record, you really ought to explore with your counsel as to the appropriateness or propriety of your refusing to make that information and those materials available to us.

Mr. SINGLETON. I just want the chairman to know that I have one such case in that category, and that's the *Dysart* case. I think that, as far as the procedures that were worked out with the staff are concerned, as far as OCR is concerned that's fine. It was the Justice Department that had some problems with the procedures with respect to their cases that they have that are open.

Mr. WEISS. The Justice Department really has been more than cooperative with us.

Finally, in closing, let me just say that the right to equal educational opportunities is one of our most important civil rights. Congress recognized just how vital freedom of education is when it passed the laws prohibiting discrimination on the basis of race, sex, handicap and age, which the Office for Civil Rights is required to enforce. Unfortunately, 2 days of hearings on the enforcement record of OCR has shown that it backs off strong law enforcement at every opportunity. We have heard testimony that OCR seeks voluntary settlements of all discrimination complaints even before the investigative process begins. Yet, the Assistant Secretary could not assure us during the first hearing that the hundreds of cases settled in this manner have a sound legal basis.

We have heard that OCR has quietly moved to a good-faith standard in measuring the effectiveness of the desegregation plans it administers. This could have a devastating impact on the hundreds of thousands of students in State systems of higher education currently under desegregation plans. Many of these plans expire at the end of this year. Despite OCR's own internal findings that the vestiges of illegal dual systems of education remain in these States, the good-faith standard may result in perpetuating the violations of title VI found in our Nation's colleges.

The subcommittee also learned that the Justice Department, the highest law enforcement authority in this country, is taking almost no action on the nearly two dozen cases referred to it by OCR since 1981, despite serious violations of law uncovered during OCR investigations. Despite serious staff shortages at OCR, we have learned that the office routinely returns millions of dollars each year to the Treasury that Congress had appropriated for civil rights law enforcement.

Most importantly, the subcommittee learned that discrimination continues to exist in America and, left unabated, will rear its ugly head again as it did decades ago before the enactment of the civil rights laws the Department of Education has pledged to enforce.

I don't believe, based on these hearings, that this pledge has been fulfilled.

Mr. Rowland.

Mr. **Rowland**. Mr. Chairman, I would just like to thank you for having these hearings. I also thank Mr. Singleton for his patience over the last 3 hours in answering questions, and even our Canadian friends, who were with us for about 2 hours.

Mr. **Weiss**. Thank you very much. Thank you for your participation, Mr. Rowland.

The subcommittee now stands adjourned, subject to the call of the Chair.

[Whereupon, at 12:45 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIX

MATERIAL SUBMITTED FOR THE RECORD

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE ASSISTANT SECRETARY FOR CIVIL RIGHTS

NOV 7 1985

Honorable Ted Weiss, Chairman
Intergovernmental Relations and
Human Resources Subcommittee
Committee on Government Operations
House of Representatives
Washington, D.C. 20515

Dear Chairman Weiss:

During my testimony before the Subcommittee on September 11, 1985, I was asked to submit a considerable amount of information for the record. In response, I am enclosing the requested information.

Sincerely,

Alicia Coro for

Harry M. Singleton
Assistant Secretary
for Civil Rights

Enclosures

400 MARYLAND AVE., S.W. WASHINGTON, D.C. 20202

Submissions for the Record Requested at the September 11, 1985 Hearing
from
Harry M. Singleton
Assistant Secretary for Civil Rights
U.S. Department of Education

o Chairman Weiss asked if Assistant Secretary Singleton recalled or knew "whether OCR remedied the situation outlined by the Quality Assurance Staff in that memo" (May 15, 1984 memo). Mr. Singleton assured Chairman Weiss that he would "check with [the] Policy and Enforcement Service to find out whether anything was -- first of all, whether or not this is a valid allegation or problem, if you will, and whether or not anything was needed to be done to take care of it" [page 27, lines 633-640 of the transcript].

The alleged problem outlined in the Quality Assurance Director's May 15 memorandum was an attempt to interject the Quality Assurance Staff into an area where they had no responsibility. The Quality Assurance Staff was charged with the responsibility for assessing cases as to their conformance with existing policy, but they were not charged with the task of redefining or recommending changes in policy.

OCR's policy on conducting interscholastic athletics investigations is delineated in the Title IX regulations and there is no problem in regard to enforcing these provisions.

o Chairman Weiss asked if the new Investigation Procedures Manual (IPM) contains a section concerning referral of cases not within OCR's jurisdiction, and if this section has in fact been added; he requested that Mr. Singleton "give [the Subcommittee] a copy of the revised IPM if you have it" [page 31, lines 730-736 of the transcript].

The revised sections from OCR's IPM are enclosed at TAB A.

o Chairman Weiss requested that Mr. Singleton "supply the Subcommittee with a copy of the memorandum" to the Quality Assurance Task Force (giving it direction) and ". . . whatever reports, briefing papers or memoranda which the Task Force has supplied to you since its creation" [page 47, lines 1113-1122 and page 48, lines 1138-1141 of the transcript].

This information is enclosed at TAB B.

o Chairman Weiss asked Assistant Secretary Singleton to "submit to the Subcommittee for our records any exchange of correspondence in regard to the Dayton case." [page 94, lines 2238-2242 of the transcript].

Staff in the Office for Civil Rights searched OCR files and retrieved seven exchanges of correspondence concerning the DAYTON PUBLIC SCHOOLS, DAYTON, OHIO case (OCR Complaint No. 05-76-0070).

This correspondence is enclosed at TAB C.

- Congressman Conyers requested that the "witness" supply information to the Subcommittee regarding the impact of the Grove City decision on OCR's cases [pages 97-100, lines 2311-2371 of the transcript].

  Prior to the Supreme Court's decision on Grove City, OCR's jurisdiction to investigate allegations of discrimination in educational institutions was considered to be relatively broad. Thus, OCR was, in many cases, satisfied that it could go forward with an investigation if any part of the institution in question received Federal financial assistance. The Grove City decision made clear that OCR would have to trace Federal funds to a more narrowly-defined program in order to have jurisdiction to even investigate a complaint.

  This applies to all complaints filed with OCR, and affects every investigation. The Grove City ruling requires OCR to find out whether relatively small parts of an educational institution receive Federal financial assistance. As a consequence, OCR must obtain considerably more information than in the past about individual Federal grants and about the organizational structure of the recipient.

  The referral of cases to the Department of Justice (DOJ) occurred prior to the Grove City ruling. That ruling, however, applies to all cases returned to OCR from DOJ, because there is no rationale for taking current enforcement action based on any jurisdictional theory that was invalidated by the Supreme Court while the case was being examined by DOJ. The collection and analysis of information on the particulars of the funding and on the organizational structure of the recipient had to be conducted again after the case was returned from DOJ. In the cases involving Malcolm-King Harlem College Extension and Dillon County School District #2, OCR has determined that there is jurisdiction to proceed under the standard set forth in Grove City. The enforcement proceeding against Dillon has commenced. In the cases involving the Anna-Jonesboro Community High School District No. 81 and the Dayton, Ohio Public Schools, OCR regional offices have been instructed to ascertain additional facts pertinent to determining whether OCR has jurisdiction, and whether there remains a violation in light of the time which has elapsed since the complaints were initially filed. The regional offices will then make recommendations to Assistant Secretary Singleton on whether OCR should initiate administrative proceedings.

- Chairman Weiss requested that Assistant Secretary Singleton "try to get information for us and submit that information to the Subcommittee for the record" on the status of a Section 504 case involving the Illinois State Board of Education [page 101, lines 2401-2403 of the transcript].

  A copy of Mr. Singleton's request to Madeleine Will, Assistant Secretary for Special Education and Rehabilitative Services, and her response of October 11, 1985 is enclosed at TAB D.

- Chairman Weiss requested that Assistant Secretary Singleton refresh his recollection and then submit his response to the Subcommittee in writing regarding his decision on the Petaluma case [page 105, lines 2487-2491 of the transcript].

  The response is enclosed at TAB E.

- Chairman Weiss asked Assistant Secretary Singleton to provide information concerning Royal Independent School District's status as a recipient of Federal financial assistance [page 109-110, lines 2592-2599 of the transcript]. Congressman Conyers requested the documentation relied on to make the Federal financial assistance determination [page 114, lines 2696-2698 of the transcript].

  This information is enclosed at TAB F.

- Chairman Weiss asked Mr. Singleton to submit information to the Subcommittee as to the "status" of the Crisp County, Georgia case. He also asked if any monitoring was being done and if the Title VI violation that OCR found had been corrected [pages 116 and 117, lines 2751-2756 of the transcript].

  By letter dated March 6, 1984, the Office for Civil Rights informed Dr. Charles Osborn, Superintendent of the Crisp County, Georgia School District, that OCR was closing its files on the Crisp County, Georgia Complaint No. 4-82-1212, because the issue contained in the OCR complaint was the subject of parallel litigation in the U.S. District Court, Southern District of Georgia, Savannah Division (Georgia State Conference of Branches of NAACP, et al., v. State of Georgia et al., Civil Action No. CV-482-233.) OCR further advised Dr. Osborn that, "consistent with its past practice and policy, OCR retains discretion to consider whether the results of those proceedings indicate that relevant Title VI issues, including, where necessary, issues relating to remedy, have been fully addressed by the court."

  Plaintiffs in the law suit asserted two causes of action. Only one is relevant here. That is, that black students have been assigned to regular classes in the public schools in the State of Georgia in ways that result in racial separation by class within otherwise desegregated schools. This action was brought under the Thirteenth and Fourteenth Amendments of the Constitution; Title VI of the Civil Rights Act of 1964; and the Equal Educational Opportunities Act, 20 U.S.C. § 1701, et seq.

  The District Court issued an opinion in the case on June 28, 1984. The court took notice of OCR's findings in the administrative complaint in making its decision. However, the court denied plaintiffs claims for relief under the Constitution and each statute listed above. Specifically, the District Court did not find "the local defendants achievement grouping practices, as implemented in the individual districts, violative of 42 U.S.C. § 2000d (Title VI)." The court concluded that the "state and local districts have demonstrated that the procedures utilized in special education placement are educationally justified and related to the purpose and goals of special education. This program is not violative of Title VI 'simply because of variances in the racial composition . . . .'" The court further concluded that "inasmuch as the local defendants' practices, as implemented, are not found to be violative of Title VI, the State defendants are not liable for their supervisory and administrative role in the distribution of Federal funds."

The District Court's opinion was appealed on September 24, 1984. A decision on appeal has not been issued.

Region IV informed Assistant Secretary Singleton on September 25, 1985, that the region's monitoring activities included keeping abreast of the Court's activities and reviewing the pleadings and findings. OCR's monitoring activities are continuing pending a decision on appeal.

A determination regarding whether any further action would be required by the Crisp County, Georgia School District will not be made until a final determination is made by the courts. Since local school districts must comply with all rules, policies and standards of the State Board, any action required of the State of Georgia will have an effect on the practices at the Crisp County, Georgia School District.

o Mr. Singleton assured Chairman Weiss that he would provide for the record the regional office "documentation for other work that may have been done at the region to obviate the need for undertaking the compliance review" (at William Patterson College) that was recommended by the Director of the Policy and Enforcement Service [pages 120-121, lines 2815-2850 of the transcript].

  The Region II memoranda is enclosed at TAB G.

o Chairman Weiss inquired as to why the administrative enforcement action against Governors State University and Chicago State University was dismissed [page 130, lines 3071-3075 of the transcript].

  An explanation is enclosed at TAB H.

o Chairman Weiss stated that "(m)emoranda from regional attorneys state that OCR has clear jurisdiction in these cases [Governors State University and Chicago State University] and should reopen them." He then asked the Assistant Secretary to review his files and submit a response as to whether that recommendation had been reviewed and what the Assistant Secretary's decision was [page 131, lines 3081-3092 of the transcript].

  As a point of clarification, the referenced memorandum from the regional attorneys does not state that OCR has clear jurisdiction in these cases. In fact, jurisdiction was not established by the region in all cases. That memorandum, as well as other memoranda responding to this request, are enclosed at TAB I.

- Chairman Weiss requested that Assistant Secretary Singleton review the Phoenix Union High School case and submit a response to the Subcommittee as to the reason that the Castro order was used as a remedy and whether the order was modified to address the concerns raised in an OCR enforcement memorandum [pages 132 and 133, lines 3096-3124 of the transcript].

  The response is enclosed at TAB J.

- With regard to Grove City College, Chairman Weiss requested that Mr. Singleton: "Double check, would you, because, again, while the court held that they did not have to adhere across the board, that they did have to adhere in those specific instances where they received funds. And so it seems to me that there is a clear indication, if they are receiving funds, for the assurance of non-violation to be signed. So, would you please check your files to see what is happening in that situation?" [page 134, lines 3142-3151 of the transcript].

  According to two Department of Education sources, the Federal Assistance Awards Data System (FAADS) and the Consolidated Assistant Secretary Postsecondary Education Retrieval System (CASPER), Grove City College is not currently receiving Federal financial assistance. Since Grove City College is not participating in any Federal student assistance programs, no assurance of compliance form is required.

TAB A

INVESTIGATION PROCEDURES MANUAL

Sections Pertaining to Procedures for
Referring Cases not Within
OCR's Jurisdiction

Section I - 1.7, pages 6-7 (as marked)
and Appendices F-1 and F-2

Section I - 1.714, pages 9-10 (as marked)

Section I - 1.10, page 16 (as marked)
and Appendix I-3

wants OCR to conduct an investigation, OCR should proceed to investigate (see I-4.3).

1.6 Incomplete Complaints

Within 15 calendar days of OCR's receipt of a complaint that omits one or more of the elements required in I-1.4, OCR must determine which elements are missing and notify the complainant of the specific elements missing, the information needed, and the date by which the information must be supplied (Appendix D).

OCR may contact the complainant by telephone and attempt to complete the complaint. If the missing elements are obtained by telephone, a memorandum to the file should specify the information provided and the date the complaint was completed. A letter outlining the new information obtained by telephone must be sent to the complainant and a copy put in the case file.

If the complainant cannot be reached by telephone, OCR must inform the complainant by certified mail, return receipt requested, that unless the information is provided within 60 days, OCR will close the complaint. 5/ If the complainant has not responded within 30 days of this notification, he/she is sent a certified letter, return receipt requested, reminding him/her that OCR will close the complaint if the additional information is not submitted within 30 calendar days (Appendix D-1). The complainant must be given written notice of the closure (Appendix D-2).

1.7 Determining Jurisdiction

In order for OCR to establish jurisdiction, the complaint must allege, or OCR must be able to infer from the facts given, discrimination based on race, color, national origin, sex, handicap or age. OCR has four jurisdictional authorities: Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975. Where OCR does not have jurisdiction,

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5/ The Discrimination Complaint form is not a requisite for filing a complete complaint. As long as the necessary information is provided to enable OCR to begin the investigation, completion of the form is not required.

OCR shall ascertain to the best of its ability whether another agency has jurisdiction, refer the complaint, and notify the complainant (Appendix F) 28 C.F.R. 42.408(b). For referrals to the EEOC, see I-1.10. For referrals to other agencies, see Appendices F-1 and F-2.

1.711 Title VI of the Civil Rights Act of 1964 (Title VI) 42 U.S.C. 2000-d *et seq*; 34 C.F.R. Part 100, 101.

Under Title VI, OCR has jurisdiction to investigate all student service and benefit complaints and certain employment complaints based on race, color, or national origin, in any program or activity receiving Federal financial assistance. Regarding employment complaints, OCR has jurisdiction if the alleged discrimination could adversely affect program beneficiaries on the basis of race, color or national origin. (Note that new procedures exist for referring certain employment complaints to the EEOC - see *Notice*, p. 0.)

There is also Title VI jurisdiction where a primary objective of the Federal financial assistance is to provide employment. In addition, ED has authority delegated from other Federal agencies; thus, its Title VI jurisdiction is not limited to those recipients of assistance from ED (see Appendix E-1).

Authority to enforce Title VI for proprietary vocational schools (privately owned, profit making enterprises that teach a trade or skill leading to immediate employment, e.g., beauty culture, computer programming) has been delegated to the Veterans' Administration.

With the exception of the following, such complaints must be forwarded to the Equal Opportunity Staff, Veterans' Assistance Service, Department of Veterans' Benefits, Veterans' Administration, 810 Vermont Avenue, N.W., Washington, D.C. 20420 (see Appendix E). The complainant must be simultaneously notified of the referral.

In special cases (e.g., a multijurisdictional case also involving Title IX allegations), OCR may decide, with the concurrence of the Veterans' Administration, to conduct its own investigation. In addition, please note that OCR remains responsible for enforcement of Title VI where a proprietary vocational school is operated by a college or university. 38 C.F.R. § 18a.1(a). Also,

1.714 Age Discrimination Act of 1975
42 U.S.C. 6101 *et seq.*

The Age Discrimination Act prohibits discrimination on the basis of age in programs or activities receiving Federal financial assistance. The Act also contains certain exceptions which permit, under limited circumstances, continued use of age distinctions or factors other than age which may have a disproportionate effect on the basis of age.

As provided in the Act, HEW published general government-wide regulations on June 12, 1979, at 45 C.F.R. Part 90, effective July 1, 1979. On September 24, 1979, HEW published its proposed agency-specific regulations also required by the Act. The Department of Education is currently developing its own agency-specific regulations and investigative procedures. In the interim, OCR should continue to follow the September 24, 1979 HEW regulations.

Under the Age Discrimination Act, OCR has jurisdiction to investigate all student services complaints. OCR does not have jurisdiction to investigate any employment complaints under the Act; they are to be sent to the Equal Employment Opportunity Commission or closed under the procedures described below.

All service complaints are fowarded to the Federal Mediation and Conciliation Service (FMCS). For complaints containing allegations of age discrimination and some other jurisdiction (Title VI, Title IX and/or Section 504), in order to allow the complaint to be forwarded to FMCS, the applicable time frame will be tolled for 60 days or until the complaint is returned from FMCS, whichever is earlier. If the complaint is not resolved by FMCS within 60 days, OCR will resume processing the complaint within the applicable time frames. OCR will notify the complainant(s) of the duration of the tolling of the time frames. The age complaints forwarded to the FMCS are sent to the attention of Ms. Mary Anderson, Program Assistant, Age Discrimination Act Program, 8th Floor, Federal Mediation and Conciliation Service, 2100 K Street, N.W., Washington, D.C. 20427. Each of the following should be sent to the FMCS:

- completed FMCS "Request for ADA Mediator Assistance";
- copy of the complaint; and

- copies of the acknowledgments sent to both the complainant and the recipient.

For complaints involving age only, the Adams time frames do not apply.

Age complaints involving employment which are filed by persons between the ages of 40 and 70 are to be referred to the appropriate EEOC regional office and the OCR file closed. EEOC does not have jurisdiction over age/employment complaints which involve persons under 40 or over 70 years of age. If the complainant is under 40 or over 70 years of age and the complaint alleges only employment discrimination, the complainant should be informed that there is no jurisdiction under the Age Discrimination Act.

Those complaints which not only involve age/employment but also some other jurisdiction (namely, Title VI, Title IX, and/or Section 504) are to be referred to EEOC for investigation of the age portion and retained by OCR for investigation of the other portion(s). Such a complaint will be split into two separate cases and each jurisdiction will be given its own docket number. The one classified as an age complaint is to be referred to EEOC and closed by OCR. The other is to be investigated by OCR within the Adams time frames.

1.72 Timeliness

1.721 180-Day Filing Requirement

A complaint must be filed within 180 calendar days of the last act of alleged discrimination unless the time for filing is extended by the Regional Director in accordance with I-1.722 below or if the complainant has utilized an internal grievance procedure.

The filing date of a complaint shall be the earliest of the following:

- postmark date of the complaint;
- date received by an OCR office; or
- date received by OCR Headquarters.

Note: This does not affect the Adams time frames (see I-1.31).

SECTION I - PRE-INVESTIGATIVE ACTIVITIES

1.10 Notice to EEOC - Employment Complaints

The EEOC must be notified of all Title VI and Title IX employment complaints filed against recipients of Federal financial assistance. Notice should be sent as soon as OCR has made at least an initial determination that it has jurisdiction over the complaint (see Appendix I and I-1.74).

For closure of complaints already investigated by the EEOC, see I-2.26.

The recipient and complainant must also be advised that we have notified the EEOC. Notice to the EEOC, recipient and complainant should be sent simultaneously. (For sample letters, see Appendices I-1 and I-2.) Such notice may be included in the acknowledgment letter (see I-3.12 and I-3.2).

Employment complaints over which OCR does not have jurisdiction must be transferred to EEOC. (For sample letter, see Appendix I-3). (For the EEOC/DOJ Rule on Employment Discrimination Complaints and explanatory memoranda, see Appendix I-4.) Note also that new procedures exist for referring certain employment complaints to the EEOC (see Notice, p. 0).

I-2.0 PRE-INVESTIGATIVE CLOSURES

2.1 Definition

For purposes of clarification and consistency, closures as defined in the CIMS have been separated by "point-in-process" categories in this manual. Closures made prior to the initiation of an investigation (the initial requesting of information) are defined as Pre-Investigative Closures.[11] Closures made after the initiation of an investigation but prior to the development of an OCR determination (review of the draft Investigative Report by the Regional Director) are defined as Pre-Determination Closures. Pre-Determination

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[11] In this manual the term "initiation of the investigation" refers to the first date on which the recipient is asked to provide investigative information. Contrast this with the "start date" as used in the Adams Order, which is the receipt or completion date of the complaint, or for reviews, the date the on-site review is started.

APPENDIX I-3

LETTER TO EEOC TRANSFERRING COMPLAINT

(Director)
Equal Employment Opportunity Commission
(City) ____________ Office
Street
City, State, Zip Code

Complainant :
OCR Docket No.:
Date Received :

Dear ________________:

Enclosed is the above-referenced complaint, transferred to your office for processing. We have determined that the Office for Civil Rights (OCR) does not have jurisdiction over the complaint, but that EEOC may have jurisdiction.

We have notified the complainant of this transfer and the reason for the transfer. The complainant has been informed that the date of receipt by OCR, shown above, will be deemed the receipt date under Title VII and/or the Equal Pay Act unless an earlier charge was received by EEOC.

This transfer and the above notice to the parties concludes this agency's consideration of this complaint.

Sincerely,

Name
Title

Enclosure

APPENDIX F-1

SAMPLE LETTER REFERRING NO JURISDICTION COMPLAINT TO ANOTHER AGENCY

Dear ____(complainant)____:

Thank you for writing to the Office for Civil Rights. The Office for Civil Rights is responsible for the enforcement of:

- Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin in activities and programs that receive Federal financial assistance;
- Title IX of the Education Amendments of 1972, which prohibits discrimination because of sex in education programs and activities that receive funds from the Department of Education;
- Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination because of handicap in programs and activities funded by the Federal Government; and
- Age Discrimination Act of 1975, which prohibits discrimination on the basis of age, under certain circumstances, in programs or activities receiving Federal financial assistance.

This Office has no jurisdiction in the matter that you brought to our attention because ______________________________. We have forwarded your letter to ____(name, phone number and address of agency)____. We believe that agency will be able to assist you.

Sincerely,

____(Regional Director)____

Enclosure

REFERRAL SLIP (TO THE AGENCY)

TO:

The enclosed correspondence pertains to a matter within your jurisdiction.

We informed the complainant that we have referred this matter to you.

(Regional Director)

Enclosure

TAB B

Date: 7/9/84
Date Due: 8/16/84

ASSIGNMENT to CHARLES TEJADA, DEWEY DODDS, TAYLOR AUGUST, and JESSE HIGH

As I discussed in the June 29, 1984 conference call on the subject of quality assurance, I want you to examine and make some proposals about the terminology used in assessing cases, about the scope of the QA reviews, and about the scoring procedure.

With regard to terminology, your analysis should cover the following questions:

1. Should we continue to assess cases as "defects" and "errors"?

2. If so, how should these terms be defined?

3. If not, what terms should be substituted?

With regard to the scope of the reviews, you should distinguish between technical and substantive errors, define and identify technical and substantive errors, and make recommendations as to the scope of the QA reviews. Keep in mind as you consider this issue that I want consistency and uniformity of result.

With regard to scoring, your analysis should examine the pros and cons of the current scoring procedure and make recommendations for changes, as appropriate.

You should submit your decision memo to me no later than August 16, 1984. The decision memo should include analyses of the terminology, scope, and scoring issues and recommendations.

Harry M. Singleton
Assistant Secretary
for Civil Rights

cc: Lauralee Over
Tricia Healy
Helene Deramond

DEPARTMENT OF EDUCATIO
OFFICE FOR CIVIL RIGHTS
REGION VII

TO : Harry M. Singleton

DATE: AUG 17 1984

FROM : Regional Director

Per your instructions of June 29, 1984, attached is the Quality Assurance Task Force Report completed by Regions II, III, VI and VII.

If you have any questions, please contact me.

Jesse L. High
Jesse L. High

BEST COPY AVAILABLE

MEMORANDUM

DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
REGION VII

TO : Harry M. Singleton
Assistant Secretary
for Civil Rights
Department of Education

DATE: AUG 17 1984

FROM : Regional Directors' Task Force on Quality Assurance
Office for Civil Rights
Department of Education

SUBJECT: Regional Directors' Quality Assurance Task Force
Recommendations

Per your instructions of June 29, 1984, Charles Tejada, Dewey Dodds, Taylor August, and Jesse High examined the Quality Assurance Program in regards to the terminology, scope, and scoring procedures employed. Our analysis and recommendations are as follows.

Issue 1 - Should cases continue to be assessed as errors and defects?

We are recommending that the practice of scoring cases as "error" and "defect" be discontinued for the following reasons:

- The terms project an unnecessarily negative connotation onto completed cases;
- The practice of scoring cases as an "error" or a "defect" makes the Quality Index (QI) of scored cases statistically unreliable as a management indicator (cases assigned an "error" or "defect" rating do not receive a numerical QI score); and
- It is possible (and has happened) when this practice is employed that a well investigated, substantially correct case is not scored for purely technical reasons.[1]

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[1] See 04-82-2-44, contained in Attachment N-B to Quality Assurance Report of Regional Performance in Processing Cases Closed in May/June 1983.

We believe it is unnecessary to substitute any new terms, and do not recommend any labels to describe instances "when information in the case file indicates that the outcome of the case was incorrect" (error)[2] or "when information in the case file indicates that more information is needed to determine the proper outcome" (defect).[3]

Instead, we believe that all cases, regardless of the types of mistakes made, should be scored. The score that a case receives (the QI) should be reflective of the overall quality of the case. Cases receiving any point deductions would require a determination as to whether any further action by the region (or Headquarters) is necessary.

The fact that cases would not be labeled as errors or defects will not eliminate instances where the outcome of the cases is incorrect nor instances where more information is needed to determine the proper outcome. However, these cases, under our proposed system, would receive a correspondingly low score compared to cases that have been handled properly. Low scored cases may or may not require further action to remedy the situation that caused the loss of points, just as errors and/or defects presently may or may not require further action.[4] It is our belief that the same conclusions, recommendations, and need for corrective actions that emanate from the present system will emanate from the proposed process. (Issue 2 continues our discussion and recommendations for the proposed scoring system.)

This proposed process would also eliminate a distinct disadvantage of the present system - a bifurcated scoring system. Presently, a case either receives a score (a QI) or the case is errored or defected. These two distinct measurements can, at times, be very inconsistent, i.e., when a well investigated, substantively correct case is not scored for purely technical reasons.

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[2] Quality Assurance Report of Regional Performance in Processing Cases Closed in May/June 1983, undated, page 3.
[3] Ibid., page 3.
[4] See 02-83-5-15, contained in Attachment N-B to Quality Assurance Report of Regional Performance in Processing Cases Closed in May/June 1983.

Further, scoring all the cases in a sample intended to compute a regional and/or national QI, and a regional and/or national item analysis, instead of categorically excluding cases scored as "errors" and "defects," will result in a management indicator that is more meaningful because it is more statistically reliable. Presently, even cases that are initially assessed as an "error" or "defect," but subsequently have the "error" or "defect" rating removed, are not scored. By not excluding cases from the sample through "error" and "defect" ratings, the sample will be more reliable because all cases intended to be used to predict outcomes will (optimally) be used.

The QI score a case receives under our proposed system generally will indicate if mistakes were made and the degree of their severity, i.e., the conclusions are incorrect, uncited technical violations, and/or procedural mistakes or omissions.

A low scored case will mean that the outcome of the case is incorrect, i.e., jurisdiction versus no jurisdiction; pre-investigative closure versus investigation; violation findings versus no violation; etc. We recommend that substantial point deductions (meaning the deduction of several points) be made only when the region has committed an act or omission that makes the outcome of the case incorrect.

A moderately low scored case will be one that contains technical violations of the regulations which are unrelated to the issues of the complaint or compliance review and for which there is no evidence that actual harm has been suffered by an individual or a class. An example is an instance when OCR investigates an allegation of racially discriminatory dismissal practices. The investigation correctly results in no violation findings on that issue. However, during the course of the investigation, OCR obtains an admission application form which requests the applicant's marital status, and OCR subsequently fails to cite the recipient for this violation. If there is no evidence that the recipient is using this inquiry to deny women admission, we believe the mistake is less grave than one in which a complainant has actually suffered harm and OCR's finding is incorrect.

Another example is during a Title IX compliance review of sexually segregated physical education classes, OCR obtains a copy of the recipient's Section 504 notice of nondiscrimination. The notice fails to include an assurance that the recipient's nondiscriminatory policy extends to employment and fails to identify the recipient's Section 504 coordinator. The violation is not cited in the LOF. While this will result in a point deduction, its effect is, we believe, less harmful and should be scored accordingly.

We believe that point deductions for not citing technical violations of the regulations should be significantly smaller than point deductions made because the outcome or conclusions related to the investigated issues are incorrect.

Procedural mistakes or omissions that do not place the outcome of the case in question or make the findings incorrect should result in an even lower number of point deductions. An example is two complaints that contain the same or similar issues being opened against the same recipient.[5] (See Attachment 2 for a listing of errors and defects identified by the Task Force that we believe to be procedural.) Point deductions for purely procedural deviations or omissions should be minor.

Decision: Discontinue to assess cases as "errors" and "defects." Cases presently assessed as "errors" or "defects" should be scored, with the points awarded in the scoring process reflecting the quality of the findings and results.

Agree ________ Disagree ________

Comments:

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[5] Case Number 08811050

Issue 2 - What Should be the Scope of the QA Review?

The task force believes that certain items presently being evaluated separately can be combined.

Combining certain items would have three benefits. It would:

- Simplify the system;
- Allow closely related items that have a real bearing on the outcome of the cases to be combined and emphasized; and
- Allow a minimum point value to be assigned to items that have no real bearing on the outcome of the case.

We have identified nine items that we believe are purely procedural and that bear no real impact on the correctness of the findings. These are items 4 and 5, acknowledgement letters (LOA's), whose contents are dictated mainly by the Adams Order, and items 8 through 14 which pertain to the Investigative Plan (IP).

Items 4 and 5 could be combined and their relative point value drastically reduced. As opposed to items 1, 2, and 3, (the completeness of the complaint, OCR's jurisdiction, and recipient status, respectively) which directly impact on the correctness of findings, we were unable to discern any relative impact that LOA's bear on findings.

The IP (items 8 through 14) can assist an investigator in reaching the proper conclusion, but is, in reality, something that could be eliminated as a formal requirement. It is not only possible, but also probable, that correct and proper findings can be made in every instance without an IP being reduced to a written, formalized document. It is, therefore, our recommendation that items 8 through 14 be combined and their relative point value be drastically reduced.

The remaining items are, we believe, substantive and directly affect the correctness of findings. There are, however, several that are closely related and should be combined. The items that we are recommending to be combined all relate to what are basically distinct processes. For instance, items 16, 17, and 18 (the Complainant Interview, Recipient and Witness Interviews, and the Follow-up of New Leads, respectively) could easily be combined as they relate to, basically, the same activity - on-site investigation. Items 21, 22, and 23 all relate to the same product, the Investigative Report. Items 24 and 25 (Complainant Notice of Adverse Findings and Follow-up to Complainant's Rebuttal) are the same process. Items 26 and 27 (LOF's to Complainant and Recipient) refer to nearly identical products. Items 29, 30, and 31 (Pre-Negotiation Activities, Negotiation Activities, and Decision to Accept or Reject Agreement) are all part of one process. Lastly, items 32 and 33 (Enforcement Action and Enforcement Memorandum) refer to one process. Those items, as grouped above, can be combined and emphasized accordingly. (Attachment 1 to this memorandum is a QA Assessment sheet that reflects the above recommendations.)

A concern also raised by the task force was the potential impact of the directives received from Headquarters' staff members that affect investigative procedures and the outcome of cases. It is recommended that directives received from members of the Assistant Secretary's immediate staff, as documented in case files, discontinue being reviewed or questioned in the QA process and not result in point deductions unless the Assistant Secretary specifically so instructs the QA Staff.

Decision: Combine the items as recommended, increasing the relative weights of the remaining substantive items and decreasing the relative weights of the technical items, as appropriate. (See attachment 1 for our recommendation on how items should be combined.)

Agree ________ Disagree ________

Comments:

BEST COPY AVAILABLE

Decision: *Directives received from members of the Assistant* Secretary's immediate staff, as documented in case files, should not be reviewed or questioned in the QA process unless so instructed by the Assistant Secretary.

Agree ________ Disagree ________

Comments:

Issue 3 - What are the pros and cons of the current scoring procedure, and what changes are appropriate?

In reaching our conclusions and recommendations, we identified what we believed to be the pros and cons of the present scoring system.

The pros are:

1. It is a novel way of reviewing cases and measuring quality. It was designed specifically for ED, OCR, and (with the below noted reservations) accomplishes its purpose.
2. The procedure employed to assess cases and the items assessed directly correspond to the Investigation Procedures Manual. This helps assure national consistency and uniformity in case processing.
3. The procedure employed provides a thorough, in-depth review of the case, including the case processing methodology and the compliance determination, which contributes to consistency and uniformity in results.
4. The QA process combines a review of the procedural, technical, and substantive aspects of case processing. All are important, but not in equal degrees.

5. The process provides the basis for an objective review of cases and case processing. Objectivity is essential in accomplishing the purposes of the QA process.

The cons are:

1. The process results in two distinct, and often times, unrelated-measurements - the Quality Index (QI) or an error and/or defect assessment. We have recommended a solution to this problem in response to Issue 1.
2. Terms employed by the process, namely "error" and "defect," are unnecessarily stigmatizing. (See Issue 1)
3. There is no mechanism to provide for the "harmless" error, which results in point deductions or error and defect assessments that are not proportionate to their affect on the end product. (See Issue 1)
4. The process necessitates a subjective assessment of the findings and actions taken by individuals uninvolved in the investigative process and, therefore, not necessarily in the best position to make that assessment.
5. It appears that the sample size is too small to produce meaningful data. For instance, it would appear to be unreasonable to base an assessment of all the regions handling of Enforcement Actions (item 32) and Enforcement Memoranda (item 33) on just one case. Further, although we do not know the number of cases closed by each region, it does not appear to be valid to base an "overall QI" for a region on one case or an error and defect rate on three cases.[6] (Admittedly, the figures used to illustrate this point are the extremes; however, these examples not only illustrate the point but also amplify the seriousness of our concern.)
6. For the uses to which the resultant data is put, the process takes too long to complete and the results (feedback) are untimely.

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[6] Quality Assurance Report of Regional Performance in Processing Cases Closed in May/June 1983, Table N-4.

7. All policies used to assess the sufficiency, correctness, and quality of findings is not codified or available to all regions on an equal basis.

8. The relative importance of each item assessed, as reflected by the "points available" assigned to each item, was not determined with input from all OCR components (i.e., all Services, Staffs, the Office of the Assistant Secretary, and the regions).

9. Headquarters' input to the investigative, evaluative, and/or decision making processes that affect case findings is not properly assessed (See Issue 2).

Solutions to what we have listed as "cons" numbers 4, 5, and 6 are beyond what we perceive to be the charge to our Task Force. We did, however, discuss options that could resolve some deficiencies of the present system, and have included them for your consideration. As these options would entail a complete reworking of the QA Program, no recommendations for adoption are being made.

For example, a possible solution to #'s 4 and 6 would be the establishment of a two part QA program with a regional component and a Headquarters' component.

The regional program would as its primary function assess the processing of cases to insure that each region is following established procedure as set forth in the IPM and written policy.

The regional program would address findings only insofar as they conformed with the IPM and written policy disseminated to the regions. It would not evaluate the analytical methods employed in arriving at findings or the legal sufficiency of the argument.

The tool used would be the QA assessment form modified to remove the substandards relating to analysis of information and sufficiency of proof.

The regional program would review a minimum of 50 percent of all closures.

A Headquarters team would, at predetermined intervals, visit each region. One component of this team would review a random sample of those cases evaluated by regional staff. The purpose of this review would be to assess uniformity and consistency among the regions in the interpretation of IPM standards and written policy. Like the regional staff, it would not evaluate analytical methods or legal sufficiency. A Headquarters team scoring a sample of cases that have been scored by regional personnel, and then comparing the scores, would allow an assessment of the reliability of the resultant QA data.

A second component of the Headquarters' team would review a preselected sample of cases. This review would be similar in scope, conduct and level of reviewing personnel to that employed when cases are placed on the Enforcement Activity Report (EAR). The reviewers would evaluate the LOP, IR, attorney opinion, and pertinent supporting documentation. They would assess:

- The analytical methods employed;
- The legal sufficiency of the argument and the accuracy of the findings;
- The conduct of negotiations (where appropriate); and
- The adequacy of the corrective action obtained (where appropriate).

This system would retain the virtues of the current QA system while eliminating many of the concerns that have been expressed. It would simplify but retain a program that assessed consistency and uniformity among the regions in carrying out established procedure. It would install a separate substantive review of case handling at a level that should minimize regional concerns about subjectivity and "second guessing." It would eliminate the costly copying process and related problems that accompany it (documents not enclosed or illegible when copied). It would permit direct interaction between regional staff and the review team, allowing immediate clarification of perceived ambiguities.

It has been our experience that we, as regional directors, receive substantially similar results from our regional QA programs in a fraction of the time taken by Headquarters' QA Staff. This type of program would allow more cases to be reviewed as the amount of time necessary for the QA process would be drastically reduced, and would, in turn, allow for more timely feedback from QA.

The analysis necessary to assess the feasibility of this option would require resources and time not allotted to this Task Force. Further analysis would require a decision by the Assistant Secretary as to whether this option should be explored and would require a cost-benefit analysis of the resources required by the regions to perform the QA function.

Another option considered involved placing the QA function either in the regions or Headquarters but limiting the scope of the QA review to three (3) documents: the Investigative Report (IR), the LOP(s), and the attorney opinion. The only other document that would need to be forwarded for review would be the complaint or the compliance review notification letter to the recipient.

When cases are entered onto the Enforcement Activities Report (EAR) for review by the Assistant Secretary and his staff, the IR, LOP, and attorney opinion are the documents available for review. Decisions on whether to issue an LOP or return the case to the region for further development are made on the basis of the review of these documents.

The IR and LOP could be reviewed against the present QA standards for assessing these documents, and a QI for each item and an overall QI for the case could be developed. (Presently, there are no standards for attorney opinions, although standards for same could, and probably should if this option was to be adopted, be developed.)

An advantage of this type review would be that more cases could be reviewed as the amount of time necessary for the QA process would be drastically reduced. This, in turn, would allow for more timely feedback from QA.

The disadvantages would include the entire investigative process not being reviewed. Compliance with all provisions of the IPM could not be assured, nor could OCR's actions taken to address issues unrelated to those initially raised by the complainant or OCR.

In determining whether or not to explore this option, consideration would have to be given to what use is to be made of the resultant QA data, and whether or not the regions should be held independently responsible for assuring that provisions of the IPM are followed. (One method for assuring compliance with the IPM would be for a QAS team to periodically - perhaps annually - visit each regional office to review a limited number of case files. Case files for these reviews would need not be identified by QAS until they arrive on-site. The results of these periodic reviews could then be used to assess regional performance as well as the reliability of the programs's results.)

An assessment of "con" #5 has previously been made the assignment of other individuals. It is our understanding that recommendations on the sample size will be forthcoming.

The solution to #7 would be to complete the INREPMAT project. Consistency and uniformity of result in case processing could be greatly enhanced by INREPMAT. As we are not aware of the status of this project, or your (the Assistant Secretary's) decision on this matter, we are unable to produce a complete discussion of this matter. However, we believe that a resource such as INREPMAT would be of inestimable value.

It is our understanding that the point values for each item assessed were assigned by the QA Staff during the pilot phase of the program. We believe that these decisions should have been made collectively by representatives from all OCR components. New relative point values for each item should be assigned consistent with what the regions, OSS, PBS, and you, as the Assistant Secretary, determine to be their relative importance. The actual assignment of relative point values to each item would be a pro forma process dictated by the results of a task force convened for the purpose of determining the relative importance of each item.

Decision: Direct the completion of the INREPMAT project.

Agree ________ Disagree ________

Comments:

Decision: Convene a task force for the purpose of assigning relative weights (point values) to each item assessed by QA. The task force should include representatives from the regions, OSS, PES, QAS, and the Assistant Secretary's staff.

Agree ________ Disagree ________

Comments:

ATTACHMENT 1

Docket Number ________________ Q. A. Number ______________ (page two)

ITEM No.	DESCRIPTION OF ITEM	QI AWARD	PTS AVAIL	N/A
1.	Complete or Incomplete			
2.	Jurisdiction			
3.	Recipient Status			
4.	Notification to Complainant and Recipient			
5.	Dual Agency/Court Complaint			
6.	Pre-investigative Administrative Closure			
7.	Investigative Plan			
8.	Denial of Access			
9.	Interviews, Follow-up on New Leads			
10.	Records, Documents, Other Information			
11.	Pre-determination Administrative Closure			
12.	Investigative Report			
13.	Notice of Adverse Findings and Follow-up			
14.	Letter(s) of Findings			
15.	Post-LOF Rebuttal or Appeal			
16.	Negotiations			
17.	Enforcement			

ATTACHMENT 2

Technical "Errors" and "Defects" Identified by the Task Force

	Docket #	
1.	01801168	No IR in file
2.	09811223	Inquiry treated as a complaint
3.	08811011	Failure to consolidate case with earlier one having same or similar issues within an institution
4.	01811088	Failure to consolidate case with earlier one having same or similar issues within an institution
5.	08811025	Failure to consolidate case with earlier one having same or similar issues within an institution
6.	05831005	No referral (PL 94-142)
7.	04811032	Procedural defect - docket number improperly assigned
8.	04811117	Procedural defect - docket number improperly assigned
9.	03822042	Failure to forward Title VI complaint alleging discrimination by a proprietary vocational education school to Veterans Administration as required
10.	04812017	No signed "withdrawal" form in file
11.	08811006	Multiple complaints against same recipient - Failure to consolidate - Incorrect determination
12.	08811009	Multiple complaints against same recipient - Failure to consolidate - Incorrect determination
13.	08811012	Multiple complaints against same recipient - Failure to consolidate - Incorrect determination
14.	15801153	Reopened complaint handled improperly

15.	15811045	Incomplete complaint - Improperly handled
16.	15811031	Incomplete complaint - Improperly handled
17.	07806007	Required documentation missing
18.	08811050	Failure to consolidate case with same or similar issues within an institution
19.	08811033	Incomplete complaint - Improperly handled
20.	02832062	Failure to forward Title VI complaint alleging discrimination by a proprietary vocational education school to Veterans Administration as required
21.	07821047	No referral - PL 94-142 -to OSE
22.	02832053	Region subjected a "class" complaint to ECR process
23.	04770104	Insufficient information to determine impact on issues of the case
24.	04826003	Insufficient information to determine impact on issues of the case
25.	08816003	Unable to assess - Not enough information - No impact on OCR findings
26.	04811105	Failure to consolidate case with same or similar issues within an institution

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

March 5, 1985

NOTE TO HARRY M. SINGLETON:

The attached memorandum was sent to Jesse High and Dewey Dodds by electronic mail. Both Jesse and Dewey concur in it and have authorized me to sign for them.

Burton M. Taylor

Attachment

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

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1985 MAR -6 PM 2:41
U.S. DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

March 5, 1985

NOTE TO HARRY M. SINGLETON:

The attached memorandum was sent to Jesse High and Dewey Dodds by electronic mail. Both Jesse and Dewey concur in it and have authorized me to sign for them.

Burton M. Taylor

Attachment

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

PURPOSE: DECISION

DATE: 5 MAR 1985

TO : Harry M. Singleton
Assistant Secretary
for Civil Rights

FROM : Jesse L. High BMT for
Regional Civil Rights Director
Region VII

Dewey E. Dodds BMT for
Regional Civil Rights Director
Region III

Burton M. Taylor, Director BMT
Quality Assurance Staff

SUBJECT: Revision of the Quality Assurance Standards

Pursuant to the decision made in response to issue 2 of the Regional Director's Quality Assurance Task Force Recommendations memorandum of August 17, 1984, we met from February 12-15, 1985 to revise the 1980 Quality Assurance (QA) Standards. We combined the items and reallocated the point values for each item. The task has been completed and the proposed QA Case Assessment Standards are attached at Tab A for your review and approval. Copies of the August 17 memorandum and the existing Standards are attached at Tabs B and C, respectively.

Although we recommend that the number of items comprising the Standards be reduced from 33 to 16, the proposed Standards use the same approach to case review as the previous Standards. Thus, the nature of the case review, i.e., review of the entire case file, has not been altered. However, the proposed Standards are much clearer and provide more definitive guidance to the reviewer. The point allocations for the items were based on the methodology described in Tab D. Points were allocated to the standards within each item based on the relative importance of the standard.

The proposed Standards are based on the October 1980 IPM, as opposed to the revised version that you are considering. Cases should be assessed on the procedures in effect at the time they were processed. Since cases processed under the revised IPM will not be available for several months, presumably the next sample of cases will be processed under the 1980 IPM. Upon issuance of the new IPM, QAS will revise the Standards to comport with it and submit them for approval.

Please let us know if you need any further information in connection with this matter.

Attachments

Tab A	Proposed QA Case Assessment Standards
Tab B	August 17 memorandum
Tab C	Existing QA Standards
Tab D	Methodology for Allocating Weights to the Revised Quality Assurance Case Assessment Standards

Decision

Adopt Revised Quality Assurance Case Assesment Standards

Approve ______________________________

Disapprove ______________________________

Other ______________________________

____

____

____

Quality Assurance Case Assessment Standards
Revised: February 1985

I. PRE-INVESTIGATIVE ACTIVITIES

A. Authority to Investigate

ITEM	REFERENCE
1. The determination that the complaint was complete was proper.	Investigation Procedures Manual, Section I-1.4 (October 1980)
(16 points - award all or none)	Adams v. Califano, Part II, A, 5

STANDARDS

a. The complaint contains the following elements:

   (1) the name and address of the complainant;

   (2) a general description or identification (but not necessarily by name) of the person or group allegedly injured by the discrimination where such person or group differs from the party filing the complaint;

   (3) the name and address of the affected recipient or other information sufficient to identify the recipient; and

   (4) a description of the alleged discrimination in sufficient detail to let OCR know what actions transpired and when they occurred.

b. The complaint was in writing and was signed.

ITEM	REFERENCE
2. The determination of jurisdiction was proper. (33 points - divide as indicated)	Investigation Procedures Manual, Section I-1.7 (October 1980)

STANDARDS

(30 pts) a. The complainant alleged that the discrimination occurred because of race, color, national origin, handicap, sex or age. The alleged discriminatory acts are prohibited by or are within the stated coverage area of the following authorities:

- (1) Title VI;
- (2) Title IX;
- (3) Section 504; or
- (4) Age Discrimination Act.

(3 pts) b. The complaint was filed within 180 days of the last act of the alleged discrimination, or the Regional Director waived the 180 day filing requirement.

ITEM	REFERENCE
3. The determination of recipient status was proper. (33 points - divide as indicated)	Investigation Procedures Manual, Section I-1.73, Appendix F (October 1980) Adams v. Califano, Part II, A, 7

STANDARDS

(33 pts) a. The recipient now receives Federal financial assistance and was a recipient at the time of the alleged violation.

- (20 pts) (1) The amount of funding and the funding source (program) are indicated in the file; and
- (13 pts) (2) The file references the source used for obtaining the funding information.

B. Notification to the Parties

ITEM	REFERENCE
4. The acknowledgment and notification letters to the parties contained all required elements.	Investigation Procedures Manual, Section I-3.II-13, 3.2 (October 1980)
(16 points - divide as indicated)	Adams v. Califano, Part II, B, 8-9

Not all standards for this item are applicable to all cases. Points for standards that are not applicable are not included in the total points available.

STANDARDS

(8 pts) a. Letter of acknowledgment to the complainant

- (4 pts) (1) The letter contained the following elements:
  - (1 pt) (a) the date of receipt of the complaint and an indication of whether the complaint is complete or incomplete;
  - (1 pt) (b) OCR's statutory jurisdiction over the complaint and the appropriate time frames for the investigation;
  - (1 pt) (c) a statement of the prohibition against retaliation and harassment of persons who file complaints of discrimination or participate in the investigation; and
  - (1 pt) (d) a notification of Privacy Act requirements.
- (1 pt) (2) The letter requested specific additional information to make the complaint complete, if required.
- (1 pt) (3) The letter advised the complainant of OCR's intent to refer the complaint to another agency, if applicable.
- (1 pt) (4) The letter indicated that OCR's investigation might be limited or curtailed by a legal or policy issue, if applicable.
- (1 pt) (5) The letter indicated the purpose of ECR, OCR's role in the process, the time frames, the relationship of the process to the investigation, and the right of the parties or OCR to terminate the process at any time, if applicable.

(7 pts) b. Notification letter to the recipient of OCR's receipt of a complaint or planned compliance review contained the following elements:

(1 pt) (1) date of receipt of the complaint;

(1 pt) (2) a general statement of the allegations contained in the complaint or the issues to be covered in the compliance review and the basis for the alleged discrimination (e.g., race, national origin, etc.) contained in the complaint;

(1 pt) (3) OCR's statutory jurisdiction and authority to conduct the review or investigation and the appropriate time frames for the review or investigation, including the date of the inception of the investigation;

(2 pts) (4) notice of the prohibition against retaliation and harassment of persons who provide information to OCR as part of a review or investigation;

(1 pt) (5) a statement that OCR's investigation might be limited or curtailed by a legal or policy issue, if appropriate.

(1 pt) (6) an explanation of the purpose of ECR, OCR's role in the process, the time frames, the relationship of the process to the investigation, and the right of the parties to terminate the process at any time, if applicable. (To be sent after the complainant agreed to ECR and signed the Privacy Act Consent Form.)

(1) c. If ECR was offered and the complainant refused to sign the Privacy Act Consent Form or the form was not returned to OCR within 15 days, ECR was terminated and a standard letter of acknowledgement, as indicated in "b" above, was issued to the recipient, if applicable.

C. Complaint Involving Other Agencies and Courts

ITEM	REFERENCE
5. OCR's processing of complaints filed with other agency(ies) or courts was proper.	Investigation Procedures Manual, Section I-4.0 (October 1980)

(16 points - divide as indicated)

Not all standards for this item are applicable to all cases. Points for standards that are not applicable are not included in the total points available.

STANDARDS

OTHER AGENCY CLOSED COMPLAINTS (16 pts)

(12 pts) a. The complaint filed with the other agency was reviewed and

- (2 pts) (1) all of the allegations made in the OCR complaint were included in the other agency's investigation;
- (2 pts) (2) findings were made on each of those allegations; and
- (2 pts) (3) remedies secured met minimum OCR standards; or
- (6 pts) (4) if any of the above were not met, OCR investigated the relevant allegations.

(4 pts) b. Copies of the complaint filed with the other agency and that agency's report or Letter of Findings are included in the case file.

OTHER AGENCY OPEN COMPLAINTS (16 pts)

(4 pts) a. OCR notified the other agency that it received the complaint and intends to investigate.

(4 pts) b. OCR coordinated its investigation and issuance of findings with that agency to the extent possible.

(4 pts) c. OCR offered to exchange investigatory information with that agency; and

(4 pts) d. OCR notified that agency of our findings and final disposition of the case.

PENDING FEDERAL LITIGATION AGAINST RECIPIENT (16 pts)

ALL CASES (8 pts)

(2 pts) a. The case file identifies the Federal court with which the complaint was filed.

(2 pts) b. Copy of the complaint filed with the court was secured and included in the case file.

(2 pts) c. Correct determination was made as to whether all issues in OCR's complaint were covered in the court suit.

(2 pts) d. Copy of the attorney opinion supporting the above-referenced determination is in the case file.

DOJ INVOLVED (8 pts)

(2 pts) e. Where the issues were covered by the court suit, the matter was referred to DOJ through the headquarters office.

(2 pts) f. Complainant and recipient were given written notice of the referral

(2 pts) g. If referral was accepted by DOJ, the case was closed.

(1 pt) h. If investigation was delegated back to OCR by DOJ, Investigative Report and evidence were submitted to DOJ through headquarters within 90 days of the delegation.

(1 pt) i. Those issues not covered by the suit were investigated by OCR.

DOJ NOT INVOLVED (8 pts)

(8 pts) j. Copies of pertinent court documents were obtained and examined by the Division Director who, in consultation with the regional attorney, made recommendations to the Regional Director on disposition of the case.

(1) all OCR issues, scope of the investigation, parties and remedies were covered in the court suit, the determination was made that OCR's investigation would not be completed ahead of the court action, and OCR closed the case with written notification to the complainant.

(2) all OCR issues, scope of the investigation, parties and remedies were not covered in the suit, substantial progress had been made in the investigation prior to OCR awareness of the suit, or the determination was made that the investigation could be completed ahead of the court action and OCR investigated accordingly.

RECIPIENT UNDER FEDERAL OR STATE COURT ORDER (16 pts)

ALL CASES (8 pts)

(2 pts) a. The case file contains a copy of the court order.

(2 pts) b. The Division Director and the regional attorney correctly determined whether all issues in the OCR complaint were covered by the court order.

(4 pts) c. Investigation was conducted and a Letter of Findings (LOF) was issued where all issues were not covered in the court order.

DOJ INVOLVED (8 pts)

(2 pts) d. If issues in the OCR complaint were covered by the court order, OCR forwarded to headquarters copies of the OCR complaint, the court order, and a draft letter notifying DOJ of the complaint.

(2 pts) e. OCR proceeded with the investigation.

(4 pts) f. At the conclusion of the investigation:

  (2 pts) (1) LOFs were prepared, addressed to complainant and recipient, and sent to headquarters for clearance; and

  (2 pts) (2) letters were prepared and addressed to DOJ and to the court under whose order the recipient is operating, and were sent to headquarters detailing OCR's findings.

DOJ NOT INVOLVED (8 pts)

(3 pts) g. Issues were covered by the court order and OCR investigated all elements of the complaint and reported its findings of fact through headquarters to the court, the plaintiff's attorney, the complainant, and the recipient.

(2 pts) h. The findings of fact included only facts, not conclusions of law, recommendations or suggested remedies.

(3 pts) i. If the facts supported a finding of a violation and if the court took no action within 90 days, OCR -- after clearance by headquarters -- issued an LOF and commenced negotiations.

STATE COURTS (8 pts)

(8 pts) Since OCR investigates all complaints filed with state courts, the case file shows that OCR requested copies of the court complaint, supporting briefs, transcripts and other documentation from the complainant's attorney.

D. Pre-Investigative Administrative Closures

ITEM	REFERENCE
6. The pre-investigative administrative closure of the complaint was handled properly.	Investigation Procedures Manual, Section I-2.0, Appendix E-1 (October 1980)
(66 points - divide as indicated)	Adams v. Califano, II, B, 8 (a-b)

Not all standards for this item are applicable to all cases. Points for standards that are not applicable are not included in the total points available.

STANDARDS

(66 pts) a. Administrative closure due to the complainant's failure to complete his or her complaint met the following requirements:

(20 pts) (1) the complainant did not provide the previously requested information;

(10 pts) (2) the complainant was notified that he or she had 120 days to complete the complaint;

(16 pts) (3) if the complainant failed to respond within 90 days of the original incomplete complaint notice, the complainant was sent a certified letter, return receipt requested, indicating OCR's intent to administratively close the complaint after 30 days of the date of the letter; and

(20 pts) (4) the complaint was closed after the 120th day and the complainant was given written notice of the closure.

OR

(66 pts) b. Administrative closure for no jurisdiction met one or more of the following requirements:

(66 pts) (1) the alleged discriminatory acts are not prohibited by or within the stated coverage areas of OCR's authorities; or

(66 pts) (2) the institution named in the complaint is not a recipient of Federal financial assistance under OCR authority.

OR

(66 pts) c. Administrative closure due to the complaint not being timely met the following requirements:

(36 pts) (1) the complaint was not filed within 180 days of the last act of discrimination; and

(30 pts) (2) the Regional Director did not waive the 180 day filing limitation.

OR

(66 pts) d. Administrative closure for a patently frivolous complaint met the following standards:

(66 pts) (1) the complaint allegations did not describe a discriminatory situation prohibited by law; or

(66 pts) (2) the complaint allegations were settled by current judicial or Departmental decisions.

OR

(66 pts) e. Administrative closure due to DOJ acceptance of the referred complaint involving issues covered in pending litigation against the recipient.

OR

(66 pts) f. Administrative closure due to resolution through Early Complaint Resolution met the following requirements:

(30 pts) (1) the complaint was amenable to ECR.

(15 pts) a. complaint did not contain class allegations or implications.

(15 pts) b. complaint did not include issues in which the Department has suspended investigative activities, unless approved by headquarters.

(5 pts) (2) the case file contains a contact log, in chronological order, which recorded all contacts with the complainant and the recipient during ECR.

(5 pts) (3) log indicates that the recipient was contacted by OCR after receipt of the Privacy Act Consent Form signed by the complainant.

(3 pts) (4) ECR was completed within 25 calendar days of receipt of the complete complaint or the file documents that an extension of up to 10 days was granted by the Regional Director.

(23 pts) (5) if ECR was successful, the case contains:

a. the signed resolution agreement or copies of letters exchanged which constitute the agreement; and

b. either an OCR Complaint Withdrawal Form signed by the complainant or a letter of complaint withdrawal signed by the complainant which provides all of the information included on the form.

OR

(66 pts) g. Administrative closure due to investigation and closure by another agency met the following requirements:

(10 pts) (1) the other agency file was reviewed by the EOS, appropriate Division Director and legal staff;

(16 pts) (2) the other agency made findings on each allegation of the complaint filed with OCR;

(30 pts) (3) the remedies secured met properly promulgated minimum OCR standards; and

(10 pts) (4) copies of the complaint filed with the other agency and that agency's report or LOF are included in the case file.

OR

(66 pts) h. Administrative closure due to complaint withdrawal prior to the start of the investigation met the following requirements:

(66 pts) (1) the letter of withdrawal from the complainant contains all of the information on OCR's Complaint Withdrawal Form; or

(66 pts) (2) the case file contains an OCR complaint withdrawal form signed by the complainant.

OR

(66 pts) i. Administrative closure as a result of directions from OCR headquarters was documented in the case file.

OR

(66 pts) j. Administrative closure because the complainant, essential to the investigation, could not be located met the following requirements:

(16 pts) (1) the last OCR communication to the complainant was sent to the last known address by certified letter, return receipt requested;

(13 pts) (2) the case file indicates OCR checked the complainant's address against telephone information and directory sources;

(12 pts) (3) OCR checked the U.S. Postal Service for any forwarding address;

(12 pts) (4) OCR checked with the recipient for the last known address of the complainant, if OCR had permission to release the complainant's name; and

(13 pts) (5) if there is more than one signatory to the complaint, the

case file indicates efforts were made to locate each signatory prior to closure.

OR

(66 pts) k. Administrative closure due to the complainant's refusal to cooperate met the following requirements:

(13 pts) (1) the complainant(s) was contacted by telephone or in person to obtain the required information;

(14 pts) (2) the file contains a brief memo explaining how the investigation is hindered by the lack of cooperation of the complainant(s);

(13 pts) (3) a certified letter was sent to the complainant(s), return receipt requested, which explained why the information is necessary and informing him or her that refusal to submit the information within 10 days would result in OCR's closing the case;

(13 pts) (4) the letter to the complainant was reviewed and signed off by the appropriate Division Director and the regional attorney; and

(13 pts) (5) if complainant(s) refused to furnish the information or did not respond to the notice within 10 days, the complaint was closed administratively and the complainant and recipient were notified.

E. Investigative Plan

ITEM	REFERENCE
7. The Investigative Plan was developed properly.	Investigation Procedures Manual, Section II-1.0, 1.31 (October 1980)

(99 points - divide as indicated)

Not all standards for this item are applicable to all cases. Points for standards that are not applicable are not included in the total points available.

STANDARDS

(5 pts) a. The Investigative Plan identified and provided background information on the complainant and recipient.

(1 pt) (1) The Investigative Plan included the name and type of recipient.

(4 pts) (2) The Investigative Plan included historical background on the complainant and recipient including:

(2 pts) (a) a chronology of the case from the alleged injury to the date of the Investigative Plan, including any contacts with the complainant and recipient;

(1 pt) (b) relevant available background data on the complainant;

(1 pt) (c) relevant available background data on the recipient, including EEO or enrollment survey data and information from OCR files.

(20 pts) b. The Investigative Plan stated all allegations -- the specific event(s) and action(s) -- which complainant alleged caused injury, in violation of statute or regulation.

(15 pts) c. All issues were identified or translated properly from allegations.

(10 pts) (1) All allegations were translated into issues relating to a violation of law under OCR jurisdiction; or, in the case of a compliance review, all issues to be investigated under OCR's jurisdictional authority were identified.

(5 pts) (2) All issues were referenced to the specific applicable regulation citation.

(22 pts) d. The Investigative Plan identified appropriate analytical approaches to be used to address all issues involved in the complaint or compliance review.

(11 pts) (1) The analysis of the issues indicated the approaches necessary to:

(a) prove or disprove the discrimination alleged in the complaint; or

(b) make a determination of compliance or noncompliance in the compliance review.

(11 pts) (2) The basic questions to be asked under each approach were identified.

(22 pts) e. The data needs identified in the Plan were adequate and proper.

(12 pts) (1) The Plan identified the data needed to resolve the issues covered in the complaint or review.

(5 pts) (2) The Plan identified the source from which the data were to be secured.

(5 pts) (3) The Plan indicated how the data were relevant to a resolution of the issues.

(10 pts) f. The Plan listed persons to be interviewed who were likely to have information relevant to determining whether a violation had occurred, including the complainant, complainant's witnesses, recipient agents and beneficiaries, and any other relevant witnessess (e.g., students, parents, employees, likely to have information bearing on the complaint or compliance issues).

(5 pts) g. The Plan was reviewed and cleared properly by the investigator's supervisor and the regional attorney.

II. INVESTIGATIVE ACTIVITIES

F. Information Collection and Analysis

	ITEM	REFERENCE
8.	The denial of access to information crucial to the investigation was handled properly.	Investigation Procedures Manual, II-2.14, III-2.0 (October 1980)

(33 points - divide as indicated)

Not all standards for this item are applicable to all cases. Points for standards that are not applicable are not included in the total points available.

STANDARDS

(7 pts) a. The case file indicates that OCR was denied access to necessary recipient records or personnel.

(6 pts) b. The recipient was given written notice of the legal authority governing OCR's right to access to the requested information and was given 10 days to comply with the request.

(6 pts) c. The notice specified the information required and the manner in which it was to be submitted, and stated the reason why the data are necessary. (Subsequent notices should be equally specific).

(7 pts) d. Negotiations were conducted to secure the requested information during the 10 day period and are documented in the file.

(7 pts) e. If the recipient failed to comply with the request during the negotiation period, the case was referred to headquarters accompanied by a memorandum recommending the initiation of formal enforcement proceedings against the recipient.

ITEM	REFERENCE
9. Interviews were conducted properly and leads to new information were pursued.	Investigation Procedures Manual, II-2.3 (October 1980)
(66 points - divide as indicated)	Adams v. Califano, Part II, B, 10
	34 CFR 100.7(c)

Not all standards for this item are applicable to all cases. Points for standards that are not applicable are not included in the total points available.

STANDARDS

(22 pts) a. The complainant was interviewed and the interview was documented properly.

(3 pts) (1) The report of the interview includes case identification (name and docket number), name and identification of the interviewee, date and location of the interview, a statement of the required notifications, and name of the interviewers. The report should indicate whether the interview was conducted by telephone.

(19 pts) (2) The interview summary contains the information pertinent to the issues raised in the complaint.

(22 pts) b. Recipient representatives and witnesses were interviewed and the interviews were documented properly.

(3 pts) (1) The report of the interview includes the case identification (name and docket number), name and identification of the interviewee, date and location of the interview, a statement of the required notifications, and name of the interviewer. The report should indicate whether the interview was conducted by telephone.

(19 pts) (2) The interview summary contains the information pertinent to the issues raised in the complaint or covered in the compliance review.

(22 pts) c. Leads to new or additional information obtained during the investigation were pursued properly.

(7 pts) (1) The new or additional information is necessary to the resolution of the issues raised in the complaint or covered in the compliance review.

(15 pts) (2) The new additional information was secured, analyzed and incorporated into previously collected data and information.

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6. Pre-Determination Administrative Closures

ITEM	REFERENCE
10. The pre-determination administrative closure was handled properly.	Investigation Procedures Manual II-3.0 (October 1980)

(66 points - divide as indicated)

Not all standards for this item are applicable to all cases. Points for standards that are not applicable are not included in the total points available.

STANDARDS

(66 pts) a. Administrative closure due to the complainant's refusal to cooperate met the following requirements:

(13 pts) (1) the complainant(s) was contacted by telephone or in person to obtain the required information;

(13 pts) (2) the file contains a brief memorandum explaining the manner in which the investigation was hindered by the complainant's failure to cooperate;

(14 pts) (3) a certified letter was sent to the complainant, return receipt requested, which explained why the information is necessary and informing him or her that refusal to submit the information within 10 days would result in OCR's closing the case;

(13 pts) (4) the letter to the complainant was reviewed and signed off by the appropriate division director and by the regional attorney:

(13 pts) (5) if the complainant refused to furnish the information or did not respond to the notice within 10 days, the complaint was closed administratively and the complainant and recipient were notified.

OR

(66 pts) b. Administrative closure because the complainant, essential to the investigation, could not be located met the following requirements:

(11 pts) (1) the last OCR communication to the complainant was sent to the last known address, by certified letter, return receipt requested;

(11 pts) (2) the case file indicates OCR checked the complainant's address against telephone information and directory sources;

(11 pts) (3) OCR checked the U.S. Postal Service for any forwarding address;

(11 pts) (4) OCR checked with the recipient for the last known address of the complainant, if OCR had permission to release the complainant's name;

(11 pts) (5) if there was more than one signatory to the complaint, the case file indicates efforts were made to locate each signatory prior to the complaint closure; and

(11 pts) (6) the recipient was notified that the investigation was closed administratively due to inability to locate the complainant.

OR

(66 pts) c. Administrative closure due to the death of the complainant or injured party met the following requirements:

(56 pts) (1) the death of the person made it impossible to investigate the allegations or the death of the person foreclosed the possibility of relief because the complaint involved potential relief solely for the complainant or the injured party.

(10 pts) (2) the recipient was notified that the investigation was closed administratively due to the the death of the complainant or the injured party.

OR

(66 pts) d. Administrative closure for complaint withdrawal met the following requirements:

(15 pts) (1) OCR had not made an initial determination of recipient compliance (i.e., Investigative Report had not been drafted and reviewed);

(15 pts) (2) the complaint was not withdrawn as a result of a notification to the complainant of a partial or total adverse finding;

(10 pts) (3) the complainant was not coerced or steered into withdrawing the complaint by either the recipient or OCR;

(10 pts) (4) the complainant was informed of his or her rights protecting against harassment and retaliation by the recipient;

(10 pts) (5) the letter of withdrawal from the complainant contains all of the information on OCR's Complaint Withdrawal Form or the case file contains an OCR Complaint Withdrawal Form signed by the

complainant.

(6 pts) (6) the complainant and the recipient were notified that the investigation was closed administratively due to the complaint withdrawal.

OR

(66 pts) e. Administrative closure due to a pre-determination settlement met the following requirements:

(6 pts) (1) issues were resolved to the satisfaction of complainant;

(30 pts) (2) the remedies met minimal OCR compliance standards; and

(30 pts) (3) the issues did not involve class allegations or have class implications, or the resolution included class remedies.

OR

(66 pts) f. Administrative closure as a result of directions from OCR headquarters was documented in the case file.

H. Investigative Report

ITEM	REFERENCE
11. The Investigative Report was developed properly. (164 points - divide as indicated)	Investigation Procedures Manual, Section II-2.32, 4.3 (October 1980)

Not all standards for this item are applicable to all cases. Points for standards that are not applicable are not included in the total points available.

STANDARDS

(8 pts) a. The complaint or compliance review issues, background and chronology of events were developed properly in the Investigative Report.

(3 pts) (1) All issues were identified and related specifically to the applicable regulation.

(2 pts) (2) The chronology of the complaint ran from the filing of the complaint to the date of the Investigative Report, including contacts with recipient and complainant. In the case of a compliance review, the chronology ran from the date of the on-site to the date of the Investigative Report, including

contacts with the recipient and witnesses.

(2 pts) (3) The chronology of a complaint included how, when and where the injured party was allegedly discriminated against by the recipient, a description of all events relative to the allegations of discrimination, and documentary evidence referenced to its location in the case file. The chronology of a compliance review included a history of the recipient's compliance background, including a discussion of complaints outstanding against the recipient, with documentary evidence referenced to its location in the case file.

(1 pt) (4) The applicable background information was accurate, properly analyzed and stated objectively.

(78 pts) b. The Report provided an analysis of the investigative findings of fact and supportive data and information.

(3 pts) (1) Each issue in the complaint or compliance review was analyzed and discussed independently.

(3 pts) (2) All documents and records were identified and labeled correctly, i.e., case name, docket number, description of document, number of pages, sources, or location of document, provider of document, date obtained and name of person receiving document.

(16 pts) (3) The discussion of each issue was referenced with a factual analysis of the pertinent supportive data and information.

(5 pts) (4) The interrelationship of data and information to each issue was explained.

(23 pts) (5) The analytical procedures employed were relevant and technically sound.

(23 pts) (6) Findings of fact were reached for each issue and were supported by the data and information analysis.

(5 pts) (7) The disputed and undisputed facts were discussed and resolved, to the extent possible.

(78 pts) c. The Report conclusions were based on the investigative findings of fact for each issue.

(19 pts) (1) The conclusions for each issue were consistent with properly promulgated OCR policy, applicable court orders and theories of proof.

(19 pts) (2) The conclusions specifically demonstrated on each issue whether

discrimination occurred and were referenced to the specific citation under the regulations.

(3 pts) (3) The conclusions were cross-referenced with the applicable analysis section.

(18 pts) (4) The rationale for each conclusion was a concise, logically ordered summary of the key findings of fact pertinent to the issue.

(19 pts) (5) Corrective actions were recommended for each violation, consistent with OCR policies, applicable court orders and the regulations.

ITEM	REFERENCE
12. The complainant was notified of adverse findings and the regional office followed up properly, if the complainant refuted the findings.	Investigation Procedures Manual, II-5.0 (October 1980) Adams v. Califano, Part II, B, 10

(33 points - divide as indicated)

Not all standards for this item are applicable to all cases. Points for standards that are not applicable are not included in the total points available.

STANDARDS

(17 pts) a. The complainant was notified of adverse findings.

(7 pts) (1) The case file indicates that the complainant was advised of a partial or total adverse finding prior to the issuance of the Letter of Findings.

(3 pts) (2) The case file contains the evidence supporting the adverse findings.

(7 pts) (3) The complainant was given a reasonable opportunity to respond prior to the issuance of the Letter of Findings.

(16 pts) b. There was proper follow-up by the regional office, if the complainant refuted the adverse findings.

(16 pts) (1) If there was follow-up:

(7 pts) (a) The receipt of additional information or data was acknowledged or additional witnesses were interviewed, as appropriate.

(7 pts) (b) The additional information was analyzed and incorporated into the previous investigative findings.

(2 pts) (c) The Investigative Report was updated to reflect the additional information and analyses.

(16 pts) (2) If there was no follow-up, the reason is included in the file.

I. Letters of Findings

ITEM	REFERENCE
13. The Letters of Findings were proper. (164 points - divide as indicated)	Investigation Procedures Manual, Section II-6.1-6.31 (October 1980) Adams v. Califano, Part II, B, 11

Not all standards for this item are applicable to all cases. Points for standards that are not applicable are not included in the total points available.

STANDARDS

(82 pts) a. The Letter of Findings to the complainant was proper.

(3 pts) (1) There was a statment of OCR's jurisdictional authority.

(64 pts) (2) There was a finding for each issue, supported by an explanation or analysis of the relevant information on which the conclusions are based.

(5 pts) (3) Each violation was referenced with a citation to the applicable regulation.

(2 pts) (4) There was a notification of the Freedom of Information Act requirements.

(2 pts) (5) There was a notification that upon request OCR will provide copies of all OCR correspondence to the recipient, subsequent to issuance of the Letter of Findings, pertaining to OCR's conclusions regarding the complaint.

(2 pts) (6) There was a notification that the Letter of Findings is not intended nor should it be construed to cover any other issues regarding compliance with applicable statutes that may exist

and were not discussed.

(4 pts) (7) The Letter of Findings was reviewed and signed off by the supervisor, appropriate division director, and regional attorney prior to release and was signed by the Regional Director.

(82 pts) b. The Letter of Findings to the recipient was proper.

(3 pts) (1) There was a statement of OCR's jurisdictional authority.

(60 pts) (2) There was a finding for each issue supported by an explanation or analysis of the relevant information on which the conclusions are based.

(3 pts) (3) There were citations of the applicable regulations for each violation found.

(3 pts) (4) There was an appropriate corrective action suggested for each violation found.

(2 pts) (5) The guidelines and time frames for fashioning remedies for violations were stated.

(1 pt) (6) There was an offer of technical assistance in developing a remedy.

(2 pts) (7) An opportunity to negotiate a remedy relative to findings of noncompliance was offered and an explanation of the procedures and time frames governing the process was given.

(2 pts) (8) There was notification of the Freedom of Information Act requirements.

(2 pts) (9) There was a notification that the Letter of Findings is not intended nor should it be construed to cover any other issues regarding compliance with applicable statutes that may exist and were not discussed.

(4 pts) (10) The Letter of Findings was reviewed and signed off by the supervisor, appropriate division director and regional attorney prior to release and was signed by the Regional Director.

ITEM	REFERENCE
14. Post LOF rebuttals, explanations, and appeals were handled properly.	Investigation Procedures Manual, II-7.1, 7.2 (October 1980)

(33 points - divide as indicated)

Not all standards for this item are applicable to all cases. Points for standards that are not applicable are not included in the total points available.

STANDARDS

(15 pts) a. OCR responded in writing within 10 days to a complainant or recipient rebuttal of a Letter of Findings.

(3 pts) b. OCR rebuttal response was signed off by the supervisor, a division director and the regional attorney.

(15 pts) c. If OCR did not revise its original findings, the following criteria were met:

(1) the complainant and recipient were given notification of their rights of appeal; and

(2) the recipient was notified that the original time frames for negotiation were applicable.

III. POST-INVESTIGATIVE

J. Negotiation

ITEM	REFERENCE
15. Pre-negotiation and negotiation activities were proper.	Investigation Procedures Manual, III-1.2-1.8 (October 1980)
(99 points - divide as indicated)	Adams v. Califano, Part II, 8, 12

Not all standards for this item are applicable to all casses. Points for standards that are not applicable are not included in the total points available.

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STANDARDS

(25 pts) a. Pre-negotiation activities were proper and complete.

(10 pts) (1) The data or information needed to fashion a remedy for each violation were compiled and are contained in the case file.

(10 pts) (2) Minimal acceptable remedies to correct each violation, the time frames in which OCR expects remediation, and the reporting and monitoring procedures are stated in the file.

(5 pts) (3) The recipient was contacted and the opportunity to negotiate remedies was restated.

(25 pts) b. Negotiation activities were completed.

(2 pts) (1) The recipient agreed to negotiate a settlement relative to the findings of noncompliance.

(13 pts) (2) Records of each negotiation session or activity were maintained and are contained in the case file. (Records include reports of meetings, letters, or file memoranda of telephone negotiation sessions).

(4 pts) (3) There is a record in the case file that the complainant was advised of the status of the negotiations applicable to the remedy being sought.

(6 pts) (4) If the remedy was less than the complainant wanted, there is evidence in the case file that the complainant was informed.

(49 pts) c. The decision to accept or reject the negotiated agreement was proper.

(12 pts) (1) All violations were addressed in the agreement.

(11 pts) (2) The remedy for each violation met minimally acceptable legal requirements.

(6 pts) (3) The time frames in which OCR expects remediation were stated.

(6 pts) (4) OCR procedures to monitor implementation of the remedy were stipulated.

(6 pts) (5) The agreement contains notification to the recipient that failure to implement the agreed upon plan within the established time frames is a violation, unless a revision has been accepted by OCR.

(4 pts) (6) The negotiated agreement was signed by the chief executive

officer for the recipient and approved by the Regional Director with the concurrence of the regional attorney, and a copy of the signed agreement is in the file. (Acceptance may be in the form of a letter or formal agreement signed by the recipient).

(4 pts) (7) The complainant was informed that corrective action was taken, if applicable.

K. Enforcement

ITEM	REFERENCE
16. OCR enforcement activities were proper.	Investigation Procedures Manual, III-2.2 (October 1980)
(66 points - divide as indicated)	Adams v. Califano, Part II, B, 13
	34 CFR 100.8

Not all standards for this item are applicable to all cases. Points for standards that are not applicable are not included in the total points available.

STANDARDS

(33 pts) a. Correct enforcement actions were taken.

(4 pts) (1) The recipient was notified in writing of OCR's intent to pursue enforcement.

(13 pts) (2) The case file established that OCR made reasonable efforts to achieve voluntary compliance within the applicable time frames.

(12 pts) (3) The transmittal memorandum recommending enforcement detailed the attempts to achieve voluntary compliance and includes an explanation of those points on which OCR and the recipient do not agree.

(4 pts) (4) The enforcement memorandum with copies of the LOF, the Investigative Report, all supporting documentation and data, and any correspondence with the recipient was forwarded to headquarters.

(33 pts) b. The enforcement memorandum contained the following elements:

(5 pts) (1) the legal authorities under which OCR conducted the investigation and the violations found in the complaint.

(4 pts) (2) a chronology of events of the investigation, i.e., date of the on-site and related investigative activities, date of the Letter of Findings, dates of submittals of response or rebuttal materials from the recipient, and dates of OCR's attempts to secure voluntary compliance;

(4 pts) (3) an evaluation of the evidence that supports each allegation;

(4 pts) (4) other relevant data not included in the Investigative Report or Letters of Findings;

(4 pts) (5) descriptions of OCR's efforts to obtain voluntary compliance;

(4 pts) (6) description of the legal theories, case precedents, regulations, guidelines, etc., that support the arguments, given the available evidence;

(4 pts) (7) statement of the rationale for enforcement; and

(4 pts) (8) draft Notice of Opportunity for Hearing.

10-31-83
TRAINING

QUALITY ASSURANCE STANDARDS

I. PRE-INVESTIGATIVE ACTIVITIES

A. Authority to Investigate

ITEM	REFERENCE
1. The determination that the complaint was complete was proper. (20)	Investigation Procedures Manual, Sections I-1.1, I-4 (October 1980) Adams v. Califano, Part II, B, 5

Q

STANDARDS

3 a. The complaint alleges that a person's or group's rights have been violated.

3 b. The complaint implicitly or specifically asks ED to seek correction of the alleged violation.

12 c. The complaint contains the following elements:

  3 (1) the name and address of the complainant;

  3 (2) a general description or identification (but not necessarily by name) of the person or group allegedly injured by the discrimination where such person or group differs from the party filing the complaint;

  3 (3) the name and address of the affected recipient or other information sufficient to identify the recipient; and

  3 (4) a description of the alleged discrimination in sufficient detail to let OCR know what actions transpired and when they occurred.

2 d. The complaint was in writing and was signed.

ITEM	REFERENCE
1. The determination of jurisdiction was proper. (20)	Investigation Procedures Manual, Section I-1.7 (October 1980) Adams v. Califano, Part II, B(a)

C

STANDARDS

8 a. The complainant alleges that the discrimination occurred because of race, color, national origin, handicap, sex or age.

4 b. The complaint was filed within 180 days of the last act of the alleged discrimination, or the Regional Director waived the 180 day filing requirement for good cause.

8 c. The alleged discriminatory acts are prohibited by or are within the stated coverage area of the following authorities:

(1) Title VI;

(2) Title IX;

(3) Section 504;

(4) Age Discrimination Act; or

(5) The Emergency School Aid Act, (Title VII of the Elementary and Secondary Education Act, as amended).

ITEM	REFERENCE
2. The determination of recipient status was proper. (20)	Investigation Procedures Manual, Section I-1.73, Appendix F (October 1980) Adams v. Califano, Part II, A, 7

4 R

STANDARDS and

a. The recipient now receives Federal financial assistance ~~or~~ was a recipient at the time of the alleged violation.

10 (1) The amount of funding ~~and~~ or the funding source (program) is indicated in the file; and

10 (2) The file references the source used for obtaining the funding information.

~~b. The file states OCR's responsibilities under delegations of authority from other Federal agencies and references the sources of information completing the delegation, when applicable.~~

C. Notification to the Parties

ITEM

4. The letter of acknowledgment to the complainant contains all required elements (10)

REFERENCE

Investigation Procedures Manual, Section I-3.7 (October 1980)

Adams v. Califano, Part II, B, 8(a)

STANDARDS

C
6
(if b, c or d apply)
9
(if b, c or d, do not apply)

a. The letter of acknowledgment contains the following elements:

(1) the date of receipt of the complaint;

(2) OCR's statutory jurisdiction over the complaint;

(3) a statement of whether the complaint is complete or incomplete;

(4) the approximate timeframes for the investigation;

(5) a statement of the prohibition against retaliation and harassment of persons who file complaints of discrimination or participate in the investigation; and

(6) a notification of Privacy Act requirements.

3
b. The letter requests specific additional information to make the complaint complete, if required.

c. The letter advises the complainant of OCR's intent to refer the complaint to another agency, if applicable.

d. The letter indicates that OCR's investigation might be limited or curtailed by a legal or policy issue, if applicable.

1 e. The letter is free of grammatical and spelling errors.

ITEM

5. The notification to the recipient of OCR's receipt of a complaint or planned compliance review contains all of the required elements. (10)

REFERENCE

Investigation Procedures Manual, Section I-3.13, I-3.2 (October 1980)

Adams v. Califano, Part II, G, 20 and 22

STANDARDS

C R

~~a. The recipient was issued a written notice of a planned compliance review or complaint investigation.~~

9
or
6
if
c
applic

9 b. The letter contains the following elements:

N/A (1) date of complaint receipt;

(2) a general statement of the allegations contained in the complaint or of the issues to be covered in the compliance review;

(3) the basis for the alleged discrimination (e.g., race, national origin, etc.,) contained in the complaint

(4) OCR's statutory jurisdiction and authority to conduct the review or investigation;

(5) the approximate timeframes for the review or investigation, including the date of the on-site;

(6) notice of the prohibition against retaliation and harassment of persons who provide information to OCR a:
part of a review or investigation; and

(7) a statement indicating whether other complaints outstanding against the recipient will be addressed duri
the review or investigation.

C R

STANDARDS
(continued)

3 0 c. The letter indicates that OCR's investigation might be limited or curtailed by a legal or policy issue, if applicable.

1 1 d. The letter is free of grammatical and spelling errors

C. Complaints Involving Other Agencies and Courts

ITEM	**REFERENCE**
8. OCR's processing of complaints filed with other agency(ies) or courts was proper. (20)	Investigation Procedures Manual, Section I-4.0 (October 1980)

STANDARDS

OTHER AGENCY CLOSED COMPLAINTS

a. (1) all of the allegations made in the OCR complaint were included in the other agency's investigation;
   (2) findings were made on each of these allegations; and
   (3) remedies secured met minimum OCR standards; or
   (4) if any of the above were deficient, OCR investigated the relevant allegations.

b. Copies of the complaint filed with the other agency and that agency's report or letter of findings are included in the case file.

OTHER AGENCY OPEN COMPLAINTS

a. OCR notified the other agency that it has received the complaint and intends to investigate.
b. OCR coordinated its investigation and issuance of findings with that agency to the extent possible.
c. OCR offered to exchange investigatory information with that agency; and
d. OCR notified that agency of our findings and final disposition of the case.

PENDING FEDERAL LITIGATION AGAINST RECIPIENT — ALL CASES

a. The case file identifies the Federal court with which the complaint was filed.
b. Copy of the complaint filed with the court was secured and included in the case file.
c. Correct determination was made whether all issues in OCR's complaint were covered in the court suit.

DOJ INVOLVED

d. Where the issues were covered by the court suit, the matter was referred to DOJ through [illegible] LFPS.
e. Complainant and recipient were given written notice of the referral.
f. If referral is accepted by DOJ case was closed.
g. If investigation was delegated back to OCR by DOJ, investigative report and evidence was submitted to DOJ through OLEP within 90 days of the delegation.
h. Those issues not covered by the suit were investigated by OCR.

DOJ NOT INVOLVED
(continued)

i. Copies of pertinent court documents were obtained and examined by the Division Director who, in consultation with the CRCRA, made recommendations to the Regional Director on disposition of the case.

(1) all issues were covered in the court suit, the determination was made that OCR's investigation would not be completed ahead of the court action and OCR closed the case with written notification to the complainant.

(2) all OCR issues, parties or remedies were not covered in the suit, substantial progress had been made in the investigation prior to OCR awareness of the suit or the determination was made that the investigation could be completed ahead of the court action and OCR investigated accordingly.

RECIPIENT UNDER FEDERAL COURT ORDER — ALL CASES

a. The case file contains a copy of the Federal court order.

b. The Division Director and the CRCRA correctly determined if all issues in the OCR complaint were covered by the court order.

c. Investigation was conducted and a letter of findings was issued where all issues were not covered in the court order.

DOJ INVOLVED

d. If issues in the OCR complaint were covered by the court order, OCR forwarded to OLEP copies of the OCR complaint and court order, and a draft letter notifying DOJ of the complaint.

e. OCR proceeds with the investigation.

f. At the conclusion of the investigation:

(1) LOFs were prepared, addressed to complainant and recipient, and sent to OLEP for clearance; and

(2) letters were prepared and addressed to DOJ and to the court under whose order the recipient is operating and sent to OLEP detailing OCR's findings.

DOJ NOT INVOLVED

g. Issues were covered by the court order and OCR investigated all elements of the complaint and reported its findings of fact through OLEP to the court, plaintiff's attorney, the complainant and the recipient.

h. The findings of fact include only facts, not conclusions of law, recommendations or suggested remedies.

i. If the court took no action within 90 days, OCR--after clearance by OLEP--issued an LOF and commenced negotiations.

STATE COURTS

a. Since OCR investigates all complaints filed with state courts, the case file shows that OCR requested copies the court complaint, supporting briefs, transcripts and other documentation from the complainant's attorney.

D. PRE-INVESTIGATIVE ADMINISTRATIVE CLOSURES

ITEM	REFERENCE
7. The pre-investigative administrative closure of the complaint was handled properly. (25)	Investigation Procedures Manual, Sections I-1.6, 1.7, 1.8 (October 1980)

C/25

STANDARDS

a. The administrative closure due to the complainant's failure to complete his or her complaint met the following requirements:

5 (1) the complainant did not provide the previously requested information;

8 (2) the complainant was notified ~~[illegible] receipt requested~~, that he or she had ~~90~~ 60 days to complete the complaint;

AS || 8 (3) if the complainant failed to respond within 90 days of the original incomplete complaint notice, complainant was sent a certified letter, return receipt requested, indicating OCR's intent to administratively close the complaint on the ~~120th~~ 60 day, and

4 (4) the complaint was closed on the ~~150th~~ 60 day ~~[illegible]~~r and the complainant was given written notice of the closure.

25 b. The administrative closure for no jurisdiction met one or more of the following requirements:

25 or (1) the complaint was not filed within 180 days;

25 or (2) the alleged discriminatory acts are not prohibited by or within the stated coverage areas of OCR's authorities;

25 (3) the institution named in the complaint is not a recipient of Federal financial assistance under OCR authority.

25 c. The administrative closure due to the complaint not being timely met the following requirements:

15 (1) the complaint was not filed within 180 days of the last act of discrimination; and

10 (2) the Regional Director did not waive the 180 day filing limitation.

25 d. The administrative closure for a patently frivolous complaint met the following standards:

25 or (1) the complaint allegations did not describe a discriminatory situation prohibited by law; or

25 (2) the complaint allegations were settled by current judicial or Departmental decisions.

25 e. The administrative closure due to the issues being covered under on-going litigation met the following requirement:

(1) Department of Justice accepted the referral of the complaint against a recipient involved in pending litigation.

f. The administrative closure due to resolution through Early Complaint Resolution met the following requirements:

(RESERVED)

continued

STANDARDS FOR EARLY COMPLAINT RESOLUTION
PRE-INVESTIGATIVE ADMINISTRATIVE CLOSURES

6

ITEM

25 7. The pre-investigative administrative closure of the complaint was handled properly.

f. The administrative closure due to resolution through Early Complaint Resolution met the following requirements:

8 (1) The complaint was amenable to ECR.

a. Complaint did not contain class allegations or implications.

b. Complaint did not include issues in which the Department has suspended investigative activities unless region was given approval by headquarters as documented in file.

4 (2) The case file contains a contact log which records all contacts with the complainant and recipient during ECR.

4 (3) Log indicates that recipient was contacted by OCR after receipt of the Privacy Act Consent Form signed by the complainant.

as of 9/82 - no longer necessary

(4) ~~The case file contains the ECR checklists [illegible] and dated.~~

4 (5) ECR was completed within 25 calendar days of receipt of the complete complaint or the file documents that an extension of up to 10 days was granted by the regional director.

5 (6) If ECR was successful, the case file contains:

optional 3 a. the signed resolution agreement or copies of letters exchanged which constitute the agreement; and

2 or 5 b. either an OCR Complaint Withdrawal Form signed by the complainant or a letter of complaint withdrawal signed by the complainant which provides all of the information included on the Form.

[illegible]
(continued)

25 g. The administrative closure due to investigation and closure by another agency met the following requirements

- 7 (1) the other agency file was reviewed by the EOS, appropriate Division Director and legal staff;
- 7 (2) the other agency made findings on each allegation of the complaint filed with OCR;
- 7 (3) the remedies secured met minimum OCR standards; and
- 4 (4) copies of the complaint filed with the other agency and that agency's report or letter of findings are included in the case file.

25 h. The administrative closure due to transferring the case to another Region met the following requirements:

delete
- (1) the recipient is located in another region;
- (2) the complainant is an employee of OCR or a relative of an employee in the regional office, or
- (3) investigative work is being done by one regional office for another (e.g., backlog situations).

25 i. The administrative closure due to complaint withdrawal prior to the start of the investigation met the following requirements:

- (1) the letter of withdrawal from the complainant contains all of the information on OCR's complaint withdrawal form; or
- (2) the case file contains an OCR complaint withdrawal form signed by the complainant.

25 j. The administrative closure as a result of directions from OCR headquarters met the following requirement:

- (1) prior to closing, the regional office had a written record of the instructions to close.

25 k. The administrative closure because the complainant, essential to the investigation, cannot be located met th following requirements:
1-5 58 1-3

- 57 9 (1) the last OCR communication to the complainant was sent to the last known address by certified letter, return receipt requested;
- 56 8 (2) the case file indicates OCR checked the complainant's address against the telephone information and directory sources;
- 56 8 (3) OCR checked the U.S. Postal Service for any forwarding address;
- 56 N/A (4) OCR checked with the recipient for the last known address of the complainant, if OCR had permission to release the complainant's name; and
- 56 N/A (5) if more than one signatory to the complaint, the case file indicates efforts were made to locate each signatory prior to closure.
1-4

25 l. The administrative closure due to the complainant's refusal to cooperate met the following requirements:

- 5 (1) the complainant(s) was contacted by telephone or in person to obtain the required information;
- 5 (2) the file contains a brief memo explaining how the investigation is hindered by the lack of cooperation the complainant;(s)
- 5 (3) a certified letter was sent to the complainant,(s) return receipt requested, which explained why the information is necessary and informing him or her that refusal to submit the information within 10 day will result in OCR's closing the case;
- 5 (4) the letter to the complainant(s) was reviewed and signed off by the appropriate Division Director and the CRCRA;
- 5 (5) if complainant(s) refused to furnish the information or did not respond to the notice within 10 days, the complaint was closed administratively and the complainant and recipient were notified, and

[redacted].

E. Investigative Plan

ITEM	REFERENCE
✓ 8. The investigative plan identifies and provides background information on the complainant and recipient. (10)	Investigation Procedures Manual, Section II-1.25 (October 1980)

R C

STANDARDS

2 2 a. The investigative plan includes the name and type of recipient.

8 8 b. The investigative plan includes historical background on the complainant and recipient including:

- N/A 2 (1) a chronology of the case from the alleged injury to the date of the investigative plan, including any contacts with complainant and recipient;
- N/A 2 (2) relevant background data on the complainant;
- 4 2 (3) relevant background data on the recipient, including information from OCR files; and
- 4 2 (4) relevant and available EEO or enrollment survey data and information from OCR files.

ITEM	REFERENCE
✓ 9. All allegations are identified properly. (10)	Investigation Procedures Manual, Section II-1.23 (October 1980)

STANDARDS

The investigative plan states the specific events and acts which complainant alleges caused injury, in violation of statute or regulation.

ITEM	REFERENCE
10. All issues are identified or translated properly from allegations. (15)	Investigation Procedures Manual, Section II-1.24 (October 1980) Adams v Califano, Part II, 6, 20

STANDARDS

c/R

10 a. All allegations were translated into issues relating to a violation of law under OCR jurisdiction; or, in the case of a compliance review, all issues to be investigated under OCR's jurisdictional authority are identified.

5 b. All issues are referenced to the specific applicable regulation citation.

ITEM	REFERENCE
11. The investigative plan identifies appropriate analytical approaches to be used to address all issues involved in the complaint or compliance review. (25)	Investigation Procedures Manual, Section II-1.28 (October 1980)

STANDARDS

c/R

~~a. Each issue to be investigated is discussed and analyzed.~~

16 a. The issue analysis indicates the approaches necessary to:

(1) prove or disprove the discrimination alleged in the complaint or

(2) make a determination of compliance or noncompliance in the compliance review.

9 b. The basic questions to be asked under each approach are identified.

ITEM	REFERENCE
12. The data needs identified in the plan are adequate and proper. (25)	Investigation Procedures Manual, Section II.1.282 (October 1980)

STANDARDS

c/

5 a. The plan stipulates the data needed to resolve the issues covered in the complaint or review.

5 b. The plan identifies the sources from which the data are to be secured.

5 c. The plan indicates how the data are relevant to a resolution of the issues.

~~d. The plan identifies data and other informational items currently available to OCR, e.g., survey data, [illegible]~~

ITEM	REFERENCE
Key witnesses are identified properly. (10)	Investigation Procedures Manual, Section II.I.2b3 (October 1980) Adams v Califano, Part II, B, 10

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c/e

STANDARDS

10 { a. The plan lists persons to be interviewed who are likely to have information relevant to determining whether a violation has occurred.

b. The persons listed include the complainant, complainant's witnesses, recipient agents and beneficiaries, and any other relevant witnesses--including students, parents, employees, etc.--likely to have information bearing on the complaint or compliance issues.

ITEM	REFERENCE
14. The plan was reviewed and cleared properly. (5)	Investigation Procedures Manual, Section II-I.2 (October 1980)

---

c/e

STANDARDS

3 a. The investigative plan was reviewed and approved by the investigator's supervisor.

2 b. The investigative plan was reviewed and approved by the regional civil rights attorney.

II. INVESTIGATIVE ACTIVITIES

F. Information Collection and Analysis

ITEM	REFERENCE
15. The denial of access to information crucial to the investigation was handled properly. (20)	Investigation Procedures Manual, Sections II-2.14, III-2.0 (October 1980)

---

cR

STANDARDS

4 a. The case file indicates that OCR was denied access to necessary recipient records or personnel.

4 b. The recipient was given written notice of the legal authority governing OCR's right to access to the requeste information and was given 10 days to comply with the request.

4 c. The notice specified the information required and the manner in which it was to be submitted, and states the reason why the data is necessary. (Subsequent notices should be equally specific).

4 d. Negotiations were conducted to secure the requested information during the 10 day period and are documented i the file.

4 e. If the recipient failed to comply with the request during the negotiation period, the case was referred to th Deputy Assistant Secretary, OLEP, accompanied by a memorandum recommending the initiation of formal enforceme proceedings against the recipient.

ITEM	REFERENCE
16. The complainant was interviewed properly and the interview was documented properly. (35)	Investigation Procedures Manual, Section II-2.3 (October 1980) Adams v Califano, Part II, 8, 10

C

STANDARDS (name and docket number)

8 a. The report of the interview includes case identification, name and identification of the interviewee, date, time and location of the interview, a statement of the required notifications, name of the interviewer, and ~~substantive summary of the interview~~. The report should indicate if the interview was conducted by telephon

25 b. The interview summary contains the information pertinent to the issues raised in the complaint.

2 c. The report of the interview is free of spelling and grammatical errors.

ITEM	REFERENCE
17. Recipient representatives and witnesses were interviewed properly and the interviews were documented properly. (35)	Investigation Procedures Manual, Section II Z.3 (October 1980) Adams v Califano, Part II, 8, 10

C/R

STANDARDS

8 a. The report of the interview includes the case identification (name and docket number), name and identification of the interviewee, date, time and location of the interview, a statement of the required notifications, name of the interviewer, ~~and a summary of the interview~~. The report should indicate if the interview was conducted by telephone.

25 b. The interview summary contains the information pertinent to the issues raised in the complaint or covered in the compliance review.

2 c. The report of the interview is free of spelling and grammatical errors.

ITEM	REFERENCE
Leads to new or additional information obtained during the INVESTIGATION ~~[illegible]~~ were pursued properly. (25)	Investigation Procedures Manual, Section II-Z.3 (October 1980) Adams v Califano, Part II, 8, 10

C/R

STANDARDS

10 a. The new or additional information is necessary to the resolution of the issues raised in the complaint or covered in the compliance review.

15 b. The new additional information was secured, analyzed and incorporated into previously collected data and information.

~~c. The report of the interview includes the case identification, name and identification of the interviewee, date, time and location of the interview, a statement of the required notifications, name of the interviewer, and a summary of the interview. The report should indicate if the interview was conducted by telephone.~~

~~d. The interview summary contains the information pertinent to the issues raised in the complaint or the compliance review.~~

~~e. The report of the interview is free of spelling and grammatical errors.~~

ITEM	REFERENCE
19. Records, documents, and information gathered were adequate for the appropriate resolution of the issues of the complaint or compliance review. (60)	Investigation Procedures Manual, Sections II-C.3, 4.32 (October 1980) Adams v Califano, Part II, B, 10

C/R

STANDARDS

15 a. Each data or information item collected is relevant to determining the recipient's compliance with the regulations and legal authorities governing the issues under investigation.

20 b. To the extent possible, each data information item corroborates, substantiates, clarifies or refutes a position or statement of the recipient, a witness, or the complainant.

20 c. To the extent possible, documents and records provide hard evidence sufficient to resolve contradictory information uncovered during the investigation.

5 d. All documents and records are identified and labeled correctly, i.e., case name, docket number, description of document, number of pages, sources or location of document, provider of document, date obtained and name of investigator receiving document.

[illegible]. Pre-Determination Administrative Closures

ITEM	REFERENCE
20. The pre-determination administrative closure of the complaint was handled properly. (25)	Investigation Procedures Manual, Section II-3.0 (October 1980) Adams v Califano, Part II, B, 8(b)

R = E + F only

C

STANDARDS

a. The Administrative closure due to the complainant's refusal to cooperate met the following requirements:

5 (1) the complainant (5) was contacted by telephone or in person to obtain the required information;

5 (2) the file contains a brief memorandum explaining the manner in which the investigation is hindered by the complainant's failure to cooperate;

5 (3) a certified letter was sent to the complainant, return receipt requested, which explains why the information is necessary and informing him or her that refusal to submit the information within 10 days will result in OCR's closing the case;

5 (4) the letter to the complainant was reviewed and signed off by the appropriate Division Director and by the CRCRA;

5 (5) if complainant refused to furnish the information or did not respond to the notice within 10 days, the complaint was closed administratively and the complainant and recipient were notified; and

~~(6) if applicable, all signatories to the complaint refused to cooperate.~~

continued

STANDARDS
(continued)

25 b. The administrative closure because the complainant, essential to the investigation, cannot be located met the following requirements:

5-7 1-3 & 6 (1) the last OCR communication to the complainant was sent to the last known address, certified letter, return receipt requested;

4 - 7 (2) the case file indicates OCR checked the complainant's address against the telephone information and directory sources;

4 5 7 (3) OCR checked the U.S. Postal Service for any forwarding address;

4 5 4 (4) OCR checked with the recipient for the last known address of the complainant, if OCR had permission to release the complainant's name; and

4 5 4 (5) if more than one signatory to the complaint, the case file records indicate efforts were made to locate each signatory prior to the complaint closure.

4 5 4 (6) the recipient was notified that the investigation was closed administratively due to inability to locate the complainant.

25 c. The administrative closure due to the death of the complainant or injured party met the following requirements:

20 { 10 (1) the death of the person made it impossible to investigate the allegations.

10 (2) the death of the person foreclosed the possibility of relief because the complaint involved potential relief soley for the complainant.

5 5 (3) the recipient was notified that the investigation was closed administratively due to the death of the complainant or injured party.

25 d. The administrative closure for complaint withdrawal met the following requirements:

7 (1) OCR had not made an initial determination of recipient compliance (i.e., Investigative Report has not been drafted) and reviewed;

7 (2) the complaint was not withdrawn as a result of a notification to the complainant of a partial or total adverse finding;

2 (3) the complainant was not coerced or steered into withdrawing the complaint by either the recipient or OCR.

2 (4) the complainant was informed of his or her rights protecting against harassment and retaliation by the recipient;

~~7 (5) all signatories to the complaint agreed to the withdrawal;~~

~~3 (6) the complaint was not a class complaint nor did it have class implications; and~~

4 (7) the letter of withdrawal from the complainant contains all of the information on OCR's complaint withdrawal form or the case file contains an OCR complaint withdrawal form signed by complainant.

3 (8) the complainant and the recipient were notified that the investigation was closed administratively due to the complaint withdrawal.

25 e. The administrative closure due to a pre-determination settlement met the following requirements:

5 2 (1) issues were resolved to the satisfaction of complainant;

15 18 (2) the remedies met minimal OCR compliance standards; and

5 7 (3) the issues did not involve class allegations or have class implications; or

5 7 (4) the resolution included class remedies.

25 f. The administrative closure as a result of directions from OCR Headquarters met the following requirement:

C/R (1) prior to closing, the Regional office had a written record of the instructions to close.

M. Investigative Report

ITEM	REFERENCE
21. The complaint or compliance review issues, background and chronology of events are developed properly in the investigative report. (20)	Investigation Procedures Manual, Section II-4.1 (October 1980)

c/R

STANDARDS

5 a. All issues are identified and related specifically to the applicable regulation.

5 b. The chronology of the complaint runs from the filing of the complaint to the date of the investigative report, including contacts with recipient and complainant. In the case of a compliance review, the chronology runs fr the date of the on-site to the date of the investigative report, including contacts with the recipient and witnesses.

5 c. The chronology of a complaint includes how, when and where the complainant was allegedly discriminated against by the recipient, a description of all events relative to the allegations of discrimination, and documentary evidence referenced to its location in the case file. The chronology of a compliance review includes a histor of the recipient's compliance background, including a discussion of complaints outstanding against the recipient, with documentary evidence referenced to its location in the case file.

3 d. The applicable background information is factual, organized, analyzed and is stated objectively.

2 e. The report is free of grammatical and spelling errors.

ITEM	REFERENCE
22. The report provides an analysis of the investigative findings of fact and supportive data and information. (80)	Investigation Procedures Manual, Section II-4.32 (October 1980)

STANDARDS

C R 10 a. Each issue in the complaint or compliance review is analyzed and discussed independently.

16 b. The discussion of each issue is referenced with a factual analysis of the pertinent supportive data and information.

10 c. The interrelationship of data and information to each issue is explained.

16 d. Findings of fact are reached for each issue and ~~is~~ are supported by the data and information analysis.

12 e. The disputed and undisputed facts are discussed and resolved, to the extent possible.

16 f. The analytical procedures employed were relevant and technically sound.

ITEM	REFERENCE
23. The report conclusions are based on the investigative findings of fact for each issue. (100)	Investigation Procedures Manual, Sections II-4.32, 4.33 (October 1980)

STANDARDS

b-E ~~a. The findings for each issue are factual and supported by documentary evidence.~~ b-F

29 22b. The conclusions for each issue are consistent with OCR policy, applicable court orders and theories of proof.

29 22c. The conclusions specifically demonstrate on each issue whether discrimination occurred and are referenced to the specific citation under the regulations.

13 22d. The conclusions are cross-referenced with the applicable analysis section.

29 22e. The rationale for each conclusion is a concise, logically-ordered summary of the key findings of fact pertinent to the issue.

n/a 22f. Corrective actions are recommended for each violation, consistent with OCR policies, applicable court orders and regulations.

ITEM	REFERENCE
24. The complainant was notified of adverse findings. (25)	Investigation Procedures Manual, Section II-5.0 (October 1980) Adams v Califano, Part II, B. 10

C

STANDARDS

10 a. The case file indicates that the complainant was advised of a partial or total adverse finding prior to the issuance of the letter of findings.

5 b. The case file contains the evidence supporting the adverse finding either in a memo or in the investigative report.

10 c. The complainant was given ~~an~~ reasonable opportunity to respond ~~10 days~~ prior to the issuance of the letter of findings.

ITEM	REFERENCE
25. There was proper follow-up by the regional office, if the complainant refuted the adverse finding. (25)	Investigation Procedures Manual, Section II-5.0 (October 1980)

C

STANDARDS

25 { 10 a. If appropriate, the receipt of additional information or data was acknowledged or additional witness were interviewed.

10 b. The additional information was analyzed and incorporated into the previous investigative findings.

5 c. The investigative report was updated to reflect the additional information and analyses.

or 25 → d. In the event there was no follow-up, the reason is included in the investigative report or memorandum to the file.

I. Letter of Findings

ITEM	REFERENCE
26. The letter of findings to the complainant was handled properly. (50)	Investigation Procedures Manual, Section II-6.0 (October 1980) Adams v Califano, Part II, B, 11

C

V N/V.

STANDARDS

1 3 a. There is a statement of OCR's jurisdictional authority.

33 33 b. There is a finding for each issue, supported by an explanation or analysis of the relevant information on wh the conclusions are based.

8 N/A c. Each violation is referenced with a citation to the applicable regulation.

2 3 d. There is a notification of the Freedom of Information Act requirements.

2 2 e. There is a notification that upon request OCR will provide copies of all OCR correspondence to the recipient subsequent to issuance of the letter of findings, pertaining to OCR's conclusion regarding the complaint.

2 3 f. There is a notification that the letter of findings is not intended nor should it be construed to cover any other issues regarding compliance with applicable statutes that may exist and are not discussed.

4 g. The letter of findings was reviewed and signed off by the supervisor, appropriate division director, and regional civil rights attorney prior to release and was signed by the Regional Director.

1 N/A h. An early warning report form was completed properly prior to mailing of the letter of findings and is inclu in the case file.

2 2 i. The letter is free of grammatical and spelling errors.

BEST COPY AVAILABLE

ITEM	REFERENCE
27. The letter of findings to the recipient was handled properly. (50)	Investigation Procedures Manual, Section II 6.0 (October 1980) Adams v Califano, Part II, B, 11

C/R
Violation / No Violation

STANDARDS

1 5 a. There is a statement of OCR's jurisdictional authority.

30 35 b. There is a finding for each issue supported by an explanation or analysis of the relevant information on which the conclusions are based.

3 4 c. There are citations of the applicable regulations for each violation found.

6 4 d. There is a suggested corrective action, for each violation found.

e. The guidelines and timeframes for fashioning remedies for violations are stated.

7 4 f. There is an offer of technical assistance in developing a remedy.

1 4 g. There is stated an opportunity to negotiate a remedy relative to findings of noncompliance and an explanation of the procedures and timeframes governing the process.

1 3 h. There is notification of the Freedom of Information Act requirements.

1 3 i. There is a notification that the letter of findings is not intended nor should it be construed to cover any other issues regarding compliance with applicable statutes that may exist and are not discussed.

3 4 j. The letter of findings was reviewed and signed off by the supervisor, appropriate division director and regional civil rights attorney prior to release and was signed by the Regional Director.

1 5 k. An Early Warning Report form was completed properly prior to the mailing of the Letter of Finding and is included in the case file.

1 2 l. The letter is free of grammatical and spelling errors.

ITEM	REFERENCE
28. Post LOF rebuttals and/or appeals were handled properly. (20)	Investigation Procedures Manual, Section II-7.0 (October 1980)

C/R

STANDARDS

17 7 a. OCR responded in writing within 10 days to a complainant or recipient rebuttal of an original letter of findings; AND THE DECISION WAS CORRECT.

3 3 b. OCR rebuttal response was signed off by the supervisor, a division director and regional civil rights attorney

N/A 10 c. If OCR did not revise its original finding, the following criteria were met:

(1) the complainant and recipient were given notification of their right of appeal; and

(2) the recipient was notified that the original timeframes for negotiation were applicable.

VII. Post-Investigative

A. Negotiation

ITEM	REFERENCE
29. Pre-negotiation activities were proper and complete. (20)	Investigation Procedures Manual, Section III-1.0 (October 1980) Adams v Califano, Part II, B, 12

C/R

STANDARDS

8 a. The data or information needed to fashion a remedy for each violation are compiled and contained in the case file.

8 b. Minimal acceptable remedies to correct each violation, the timeframes in which OCR expects remediation, and the reporting and monitoring procedures are stated in the file.

4 c. The recipient was contacted and the opportunities to negotiate remedies were restated.

ITEM	REFERENCE
20. Negotiation activities were completed. (20)	Investigation Procedures Manual, Section III-1.6,1.7 (October 1980) Adams v Califano, Part II, 8, 12

C STANDARDS **R**

5/2 a. The recipient agreed to negotiate a settlement relative to the findings of noncompliance. 10

10/8 b. Records of each negotiation session or activity were maintained and are contained in the case file. (Records include reports of meetings, letters, or file memoranda of telephone negotiation sessions.) 10

5/4 c. There is a record in the case file that the complainant was advised of the status of the negotiations applicable to the remedy being sought. 4

4/6 d. If the remedy is less than the complainant wanted, there is evidence in the case file that the complainant has been informed. 4

C × R

ITEM	REFERENCE
21. The decision to accept or reject the negotiated agreement was proper. (35)	Investigation Procedures Manual, Section III-1.7 (October 1980)

C R STANDARDS

7/7 a. All violations have been addressed in the agreement.

7/7 b. The remedy for each violation meets minimally acceptable legal requirements.

4/5 c. The timeframes in which OCR expects remediation are stated.

4/5 d. OCR procedures to monitor implementation of the remedy are stipulated.

5/6 e. The agreement contains notification to the recipient that failure to achieve the remedy within the established timeframes is a violation.

4/5 f. The negotiated agreement has been signed by the chief executive officer for the recipient and approved by the Regional Director with the concurrence of the OCRLA and a copy of the agreement is in the file. (Acceptance may be in the form of a letter or formal agreement signed by the recipient.) Signed

4/– g. The complainant was informed that corrective action was taken, if applicable.

OCR/QAS October 1980

E. Enforcement

ITEM	REFERENCE
32. Correct enforcement actions were taken. (35)	Investigation Procedures Manual, Section III-2.3 (October 1980) Adams v Califano, Part II, B, 13

C/R

STANDARDS

5 a. The recipient has been notified in writing of OCR's intent to pursue enforcement.

13 b. The case file established that OCR exhausted all efforts to achieve voluntary compliance within the applicable timeframes.

12 c. The transmittal memorandum recommending enforcement details the attempts to achieve voluntary compliance and includes an explanation of those points on which OCR and the recipient do not agree.

5 d. The enforcement memorandum with copies of the LOF, the investigative report, all supporting documentation and data, and any correspondence with the recipient was forwarded to the Deputy Assistant Secretary, OLEP.

ITEM	REFERENCE
33. The memorandum recommending enforcement was substantively adequate. (35)	Investigation Procedures Manual, Section III-2.2 (October 1980)

C/R

STANDARDS

32 a. The litigation memorandum in the case file contains the following:

4 each (1) the legal authorities under which OCR conducted the investigation and the violations found for each allegation raised in the complaint;

(2) a chronology of events of the investigation, i.e., date of the on-site and related investigative activities, date of the letter of findings, dates of submittals of response or rebuttal materials from t recipient, and dates of OCR's attempts to secure voluntary compliance;

(3) an evaluation of the evidence that supports each allegation;

(4) other relevant data not included in the investigative report or Letters of Findings,

(5) descriptions of OCR's efforts to obtain voluntary compliance;

(6) description of the legal theories, case precedents, regulations, guidelines, etc., that support the arguments given the available evidence;

(7) statement of the rationale for enforcement; and

(8) draft Notice of Opportunity for Hearing.

3 b. The memorandum is free of grammatical and spelling errors.

Rec'd on 1/10/85 Burt T-

MEMORANDUM

From Kin Mines

DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
REGION VII

DATE: AUG 17 1984

TO : Harry M. Singleton
Assistant Secretary
for Civil Rights
Department of Education

FROM : Regional Directors' Task Force on Quality Assurance
Office for Civil Rights
Department of Education

SUBJECT: Regional Directors' Quality Assurance Task Force
Recommendations

Per your instructions of June 29, 1984, Charles Tejada, Dewey Dodds, Taylor August, and Jesse High examined the Quality Assurance Program in regards to the terminology, scope, and scoring procedures employed. Our analysis and recommendations are as follows.

Issue 1 - Should cases continue to be assessed as errors and defects?

We are recommending that the practice of scoring cases as "error" and "defect" be discontinued for the following reasons:

- The terms project an unnecessarily negative connotation onto completed cases;
- The practice of scoring cases as an "error" or a "defect" makes the Quality Index (QI) of scored cases statistically unreliable as a management indicator (cases assigned an "error" or "defect" rating do not receive a numerical QI score); and
- It is possible (and has happened) when this practice is employed that a well investigated, substantially correct case is not scored for purely technical reasons.[1]

---

[1] See 04-82-2-44, contained in Attachment N-B to Quality Assurance Report of Regional Performance in Processing Cases Closed in May/June 1983.

1.

We believe it is unnecessary to substitute any new terms, and do not recommend any labels to describe instances "when information in the case file indicates that the outcome of the case was incorrect" (error)[2] or "when information in the case file indicates that more information is needed to determine the proper outcome" (defect).[3]

Instead, we believe that all cases, regardless of the types of mistakes made, should be scored. The score that a case receives (the QI) should be reflective of the overall quality of the case. Cases receiving any point deductions would require a determination as to whether any further action by the region (or Headquarters) is necessary.

The fact that cases would not be labeled as errors or defects will not eliminate instances where the outcome of the cases is incorrect nor instances where more information is needed to determine the proper outcome. However, these cases, under our proposed system, would receive a correspondingly low score compared to cases that have been handled properly. Low scored cases may or may not require further action to remedy the situation that caused the loss of points, just as errors and/or defects presently may or may not require further action.[4] It is our belief that the same conclusions, recommendations, and need for corrective actions that emanate from the present system will emanate from the proposed process. (Issue 2 continues our discussion and recommendations for the proposed scoring system.)

This proposed process would also eliminate a distinct disadvantage of the present system - a bifurcated scoring system. Presently, a case either receives a score (a QI) or the case is errored or defected. These two distinct measurements can, at times, be very inconsistent, i.e., when a well investigated, substantively correct case is not scored for purely technical reasons.

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[2] Quality Assurance Report of Regional Performance in Processing Cases Closed in May/June 1983, undated, page 3.

[3] Ibid., page 3.

[4] See 02-83-5-15, contained in Attachment N-B to Quality Assurance Report of Regional Performance in Processing Cases Closed in May/June 1983.

Further, scoring all the cases in a sample intended to compute a regional and/or national QI, and a regional and/or national item analysis, instead of categorically excluding cases scored as "errors" and "defects," will result in a management indicator that is more meaningful because it is more statistically reliable. Presently, even cases that are initially assessed as an "error" or "defect," but subsequently have the "error" or "defect" rating removed, are not scored. By not excluding cases from the sample through "error" and "defect" ratings, the sample will be more reliable because all cases intended to be used to predict outcomes will (optimally) be used.

The QI score a case receives under our proposed system generally will indicate if mistakes were made and the degree of their severity, i.e., the conclusions are incorrect, uncited technical violations, and/or procedural mistakes or omissions.

A low scored case will mean that the outcome of the case is incorrect, i.e., jurisdiction versus no jurisdiction; pre-investigative closure versus investigation; violation findings versus no violation; etc. We recommend that substantial point deductions (meaning the deduction of several points) be made only when the region has committed an act or omission that makes the outcome of the case incorrect.

A moderately low scored case will be one that contains technical violations of the regulations which are unrelated to the issues of the complaint or compliance review and for which there is no evidence that actual harm has been suffered by an individual or a class. An example is an instance when OCR investigates an allegation of racially discriminatory dismissal practices. The investigation correctly results in no violation findings on that issue. However, during the course of the investigation, OCR obtains an admission application form which requests the applicant's marital status, and OCR subsequently fails to cite the recipient for this violation. If there is no evidence that the recipient is using this inquiry to deny women admission, we believe the mistake is less grave than one in which a complainant has actually suffered harm and OCR's finding is incorrect.

Another example is during a Title IX compliance review of sexually segregated physical education classes, OCR obtains a copy of the recipient's Section 504 notice of nondiscrimination. The notice fails to include an assurance that the recipient's nondiscriminatory policy extends to employment and fails to identify the recipient's Section 504 coordinator. The violation is not cited in the LOF. While this will result in a point deduction, its effect is, we believe, less harmful and should be scored accordingly.

We believe that point deductions for not citing technical violations of the regulations should be significantly smaller than point deductions made because the outcome or conclusions related to the investigated issues are incorrect.

Procedural mistakes or omissions that do not place the outcome of the case in question or make the findings incorrect should result in an even lower number of point deductions. An example is two complaints that contain the same or similar issues being opened against the same recipient.[5] (See Attachment 2 for a listing of errors and defects identified by the Task Force that we believe to be procedural.) Point deductions for purely procedural deviations or omissions should be minor.

Decision: Discontinue to assess cases as "errors" and "defects." Cases presently assessed as "errors" or "defects" should be scored, with the points awarded in the scoring process reflecting the quality of the findings and results.

Agree ✓ KAm Disagree ______

Comments:

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[5] Case Number 08811050

Issue 2 - What Should be the Scope of the QA Review?

The task force believes that certain items presently being evaluated separately can be combined.

Combining certain items would have three benefits. It would:

- Simplify the system;
- Allow closely related items that have a real bearing on the outcome of the cases to be combined and emphasized; and
- Allow a minimum point value to be assigned to items that have no real bearing on the outcome of the case.

We have identified nine items that we believe are purely procedural and that bear no real impact on the correctness of the findings. These are items 4 and 5, acknowledgement letters (LOA's), whose contents are dictated mainly by the Adams Order, and items 8 through 14 which pertain to the Investigative Plan (IP).

Items 4 and 5 could be combined and their relative point value drastically reduced. As opposed to items 1, 2, and 3, (the completeness of the complaint, OCR's jurisdiction, and recipient status, respectively) which directly impact on the correctness of findings, we were unable to discern any relative impact that LOA's bear on findings.

The IP (items 8 through 14) can assist an investigator in reaching the proper conclusion, but is, in reality, something that could be eliminated as a formal requirement. It is not only possible, but also probable, that correct and proper findings can be made in every instance without an IP being reduced to a written, formalized document. It is, therefore, our recommendation that items 8 through 14 be combined and their relative point value be drastically reduced.

The remaining items are, we believe, substantive and directly affect the correctness of findings. There are, however, several that are closely related and should be combined. The items that we are recommending to be combined all relate to what are basically distinct processes. For instance, items 16, 17, and 18 (the Complainant Interview, Recipient and Witness Interviews, and the Follow-up of New Leads, respectively) could easily be combined as they relate to, basically, the same activity - on-site investigation. Items 21, 22, and 23 all relate to the same product, the Investigative Report. Items 24 and 25 (Complainant Notice of Adverse Findings and Follow-up to Complainant's Rebuttal) are the same process. Items 26 and 27 (LOF's to Complainant and Recipient) refer to nearly identical products. Items 29, 30, and 31 (Pre-Negotiation Activities, Negotiation Activities, and Decision to Accept or Reject Agreement) are all part of one process. Lastly, items 32 and 33 (Enforcement Action and Enforcement Memorandum) refer to one process. Those items, as grouped above, can be combined and emphasized accordingly. (Attachment 1 to this memorandum is a QA Assessment sheet that reflects the above recommendations.)

A concern also raised by the task force was the potential impact of the directives received from Headquarters' staff members that affect investigative procedures and the outcome of cases. It is recommended that directives received from members of the Assistant Secretary's immediate staff, as documented in case files, discontinue being reviewed or questioned in the QA process and not result in point deductions unless the Assistant Secretary specifically so instructs the QA Staff.

Decision: Combine the items as recommended, increasing the relative weights of the remaining substantive items and decreasing the relative weights of the technical items, as appropriate. (See attachment 1 for our recommendation on how items should be combined.)

J.F.

Agree ________ Disagree ________

Comments:

Decision: Directives received from members of the Assistant Secretary's immediate staff, as documented in case files, should not be reviewed or questioned in the QA process unless so instructed by the Assistant Secretary.

Agree ✓ Disagree ________

Comments:

Issue 3 - What are the pros and cons of the current scoring procedure, and what changes are appropriate?

In reaching our conclusions and recommendations, we identified what we believed to be the pros and cons of the present scoring system.

The pros are:

1. It is a novel way of reviewing cases and measuring quality. It was designed specifically for ED, OCR, and (with the below noted reservations) accomplishes its purpose.
2. The procedure employed to assess cases and the items assessed directly correspond to the Investigation Procedures Manual. This helps assure national consistency and uniformity in case processing.
3. The procedure employed provides a thorough, in-depth review of the case, including the case processing methodology and the compliance determination, which contributes to consistency and uniformity in results.
4. The QA process combines a review of the procedural, technical, and substantive aspects of case processing. All are important, but not in equal degrees.

Errors, defect not [illegible] from [illegible].

5. The process provides the basis for an objective review of cases and case processing. Objectivity is essential in accomplishing the purposes of the QA process.

The cons are:

1. The process results in two distinct, and often times, unrelated measurements - the Quality Index (QI) or an error and/or defect assessment. We have recommended a solution to this problem in response to Issue 1.

2. Terms employed by the process, namely "error" and "defect," are unnecessarily stigmatizing. (See Issue 1)

3. There is no mechanism to provide for the "harmless" error, which results in point deductions or error and defect assessments that are not proportionate to their affect on the end product. (See Issue 1)

4. The process necessitates a subjective assessment of the findings and actions taken by individuals uninvolved in the investigative process and, therefore, not necessarily in the best position to make that assessment.

5. It appears that the sample size is too small to produce meaningful data. For instance, it would appear to be unreasonable to base an assessment of all the regions handling of Enforcement Actions (item 32) and Enforcement Memoranda (item 33) on just one case. Further, although we do not know the number of cases closed by each region, it does not appear to be valid to base an "overall QI" for a region on one case or an error and defect rate on three cases.[6] (Admittedly, the figures used to illustrate this point are the extremes; however, these examples not only illustrate the point but also amplify the seriousness of our concern.)

6. For the uses to which the resultant data is put, the process takes too long to complete and the results (feedback) are untimely.

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[6] Quality Assurance Report of Regional Performance in Processing Cases Closed in May/June 1983, Table N-4.

7. All policies used to assess the sufficiency, correctness, and quality of findings is not codified or available to all regions on an equal basis.

8. The relative importance of each item assessed, as reflected by the "points available" assigned to each item, was not determined with input from all OCR components (i.e., all Services, Staffs, the Office of the Assistant Secretary, and the regions).

9. Headquarters' input to the investigative, evaluative, and/or decision making processes that affect case findings is not properly assessed (See Issue 2).

Solutions to what we have listed as "cons" numbers 4, 5, and 6 are beyond what we perceive to be the charge to our Task Force. We did, however, discuss options that could resolve some deficiencies of the present system, and have included them for your consideration. As these options would entail a complete reworking of the QA Program, no recommendations for adoption are being made.

For example, a possible solution to #'s 4 and 6 would be the establishment of a two part QA program with a regional component and a Headquarters' component.

The regional program would as its primary function assess the processing of cases to insure that each region is following established procedure as set forth in the IPM and written policy.

The regional program would address findings only insofar as they conformed with the IPM and written policy disseminated to the regions. It would not evaluate the analytical methods employed in arriving at findings or the legal sufficiency of the argument.

The tool used would be the QA assessment form modified to remove the substandards relating to analysis of information and sufficiency of proof.

The regional program would review a minimum of 50 percent of all closures.

A Headquarters team would, at predetermined intervals, visit each region. One component of this team would review a random sample of those cases evaluated by regional staff. The purpose of this review would be to assess uniformity and consistency among the regions in the interpretation of IPM standards and written policy. Like the regional staff, it would not evaluate analytical methods or legal sufficiency. A Headquarters team scoring a sample of cases that have been scored by regional personnel, and then comparing the scores, would allow an assessment of the reliability of the resultant QA data.

A second component of the Headquarters' team would review a preselected sample of cases. This review would be similar in scope, conduct and level of reviewing personnel to that employed when cases are placed on the Enforcement Activity Report (EAR). The reviewers would evaluate the LOF, IR, attorney opinion, and pertinent supporting documentation. They would assess:

- The analytical methods employed;
- The legal sufficiency of the argument and the accuracy of the findings;
- The conduct of negotiations (where appropriate); and
- The adequacy of the corrective action obtained (where appropriate).

This system would retain the virtues of the current QA system while eliminating many of the concerns that have been expressed. It would simplify but retain a program that assessed consistency and uniformity among the regions in carrying out established procedure. It would install a separate substantive review of case handling at a level that should minimize regional concerns about subjectivity and "second guessing." It would eliminate the costly copying process and related problems that accompany it (documents not enclosed or illegible when copied). It would permit direct interaction between regional staff and the review team, allowing immediate clarification of perceived ambiguities.

It has been our experience that we, as regional directors, receive substantially similar results from our regional QA programs in a fraction of the time taken by Headquarters' QA Staff. This type of program would allow more cases to be reviewed as the amount of time necessary for the QA process would be drastically reduced, and would, in turn, allow for more timely feedback from QA.

The analysis necessary to assess the feasibility of this option would require resources and time not allotted to this Task Force. Further analysis would require a decision by the Assistant Secretary as to whether this option should be explored and would require a cost-benefit analysis of the resources required by the regions to perform the QA function.

Another option considered involved placing the QA function either in the regions or Headquarters but limiting the scope of the QA review to three (3) documents: the Investigative Report (IR), the LOF(s), and the attorney opinion. The only other document that would need to be forwarded for review would be the complaint or the compliance review notification letter to the recipient.

When cases are entered onto the Enforcement Activities Report (EAR) for review by the Assistant Secretary and his staff, the IR, LOF, and attorney opinion are the documents available for review. Decisions on whether to issue an LOF or return the case to the region for further development are made on the basis of the review of these documents.

The IR and LOF could be reviewed against the present QA standards for assessing these documents, and a QI for each item and an overall QI for the case could be developed. (Presently, there are no standards for attorney opinions, although standards for same could, and probably should if this option was to be adopted, be developed.)

An advantage of this type review would be that more cases could be reviewed as the amount of time necessary for the QA process would be drastically reduced. This, in turn, would allow for more timely feedback from QA.

The disadvantages would include the entire investigative process not being reviewed. Compliance with all provisions of the IPM could not be assured, nor could OCR's actions taken to address issues unrelated to those initially raised by the complainant or OCR.

In determining whether or not to explore this option, consideration would have to be given to what use is to be made of the resultant QA data, and whether or not the regions should be held independently responsible for assuring that provisions of the IPM are followed. (One method for assuring compliance with the IPM would be for a QAS team to periodically - perhaps annually - visit each regional office to review a limited number of case files. Case files for these reviews would need not be identified by QAS until they arrive on-site. The results of these periodic reviews could then be used to assess regional performance as well as the reliability of the programs's results.)

An assessment of "con" #5 has previously been made the assignment of other individuals. It is our understanding that recommendations on the sample size will be forthcoming.

The solution to #7 would be to complete the INREFMAT project. Consistency and uniformity of result in case processing could be greatly enhanced by INREFMAT. As we are not aware of the status of this project, or your (the Assistant Secretary's) decision on this matter, we are unable to produce a complete discussion of this matter. However, we believe that a resource such as INREFMAT would be of inestimable value.

It is our understanding that the point values for each item assessed were assigned by the QA Staff during the pilot phase of the program. We believe that these decisions should have been made collectively by representatives from all OCR components. New relative point values for each item should be assigned consistent with what the regions, OSS, PES, and you, as the Assistant Secretary, determine to be their relative importance. The actual assignment of relative point values to each item would be a pro forma process dictated by the results of a task force convened for the purpose of determining the relative importance of each item.

Decision: Direct the completion of the INREFMAT project.

Agree ________ Disagree ________

Comments:

Decision: Convene a task force for the purpose of assigning relative weights (point values) to each item assessed by QA. The task force should include representatives from the regions, OSS, PES, QAS, and the Assistant Secretary's staff.

Agree ________ Disagree ________

Comments:

Docket Number ______________ Q. A. Number ____________ (page two)

ITEM No.	DESCRIPTION OF ITEM	QI AWARD	PTS AVAIL	N/A
1.	Complete or Incomplete 1			
2.	Jurisdiction 2			
3.	Recipient Status 3			
4.	Notification to Complainant and Recipient 4 & 5			
5.	Dual Agency/Court Complaint 6			
6.	Pre-investigative Administrative Closure 7			
7.	Investigative Plan 8 - 14			
8.	Denial of Access 15			
9.	Interviews, Follow-up on New Leads 16 -18			
10.	Records, Documents, Other Information 19			
11.	Pre-determination Administrative Closure 20			
12.	Investigative Report 21-23			
13.	Notice of Adverse Findings and Follow-up 24-25			
14.	Letter(s) of Findings 26 -27			
15.	Post-LOF Rebuttal or Appeal 28			
16.	Negotiations 29- 31			
17.	Enforcement 32-33			

ATTACHMENT 2

Technical "Errors" and "Defects" Identified by the Task Force

	Docket #	
1.	01801168	No IR in file
2.	09811223	Inquiry treated as a complaint
3.	08811011	Failure to consolidate case with earlier one having same or similar issues within an institution
4.	01811088	Failure to consolidate case with earlier one having same or similar issues within an institution
5.	08811025	Failure to consolidate case with earlier one having same or similar issues within an institution
6.	05831005 ✓	No referral (PL 94-142)
7.	04811032	Procedural defect - docket number improperly assigned
8.	04811117	Procedural defect - docket number improperly assigned
9.	03822042	Failure to forward Title VI complaint alleging discrimination by a proprietary vocational education school to Veterans Administration as required
10.	04812017	No signed "withdrawal" form in file
11.	08811006	Multiple complaints against same recipient - Failure to consolidate - Incorrect determination
12.	08811009	Multiple complaints against same recipient - Failure to consolidate - Incorrect determination
13.	08811012	Multiple complaints against same recipient - Failure to consolidate - Incorrect determination
14.	15801153	Reopened complaint handled improperly

15.	15811045	Incomplete complaint - Improperly handled
16.	15811031	Incomplete complaint - Improperly handled
17.	07806007	Required documentation missing
18.	08811050	Failure to consolidate case with same or similar issues within an institution
19.	08811033	Incomplete complaint - Improperly handled
20.	02832062	Failure to forward Title VI complaint alleging discrimination by a proprietary vocational education school to Veterans Administration as required
21.	07821047	No referral - PL 94-142 -to OSE
22.	02832053	Region subjected a "class" complaint to ECR process
23.	04770104	Insufficient information to determine impact on issues of the case
24.	04826003	Insufficient information to determine impact on issues of the case
25.	08816003	Unable to assess - Not enough information - No impact on OCR findings
26.	04811105	Failure to consolidate case with same or similar issues within an institution

Methodology for Allocating Weights to the Revised Quality Assurance Case Assessment Standards

Dewey Dodds, Jesse High, Burton Taylor and Monte Eeds (Task Force) met in Washington, D. C. from February 12-14 to discuss revision of the quality assurance case assessment standards and the weights allocated to them. Described below is the procedure utilized in allocating weights.

The proposed standards consists of sixteen items. The task force allocated a rating of 1 to 5 for each item, 1 being the highest and 5 being the lowest. Attached is a sheet stating each item and indicating the rating given to each, and the points available for each.

The following procedure was used to establish point values for each of the items:

- o Items rated 3 were given a value of 6.25 (1/16)
- o Items rated 5 were given a value of 1.56 (25% of 6.25)
- o Items rated 4 were given a value of 3.13 (50% of 6.25)
- o Items rated 2 were given a value of 9.38 (150% of 6.25)
- o Items rated 1 were given a value of 15.63 (250% of 6.25)

Each of these values were multiplied by a factor of 1.05 in order to have the value for all 16 items total 100.

The adjusted value are:

Rating	Adjusted Value
5	1.64
4	3.29
3	6.56
2	9.85
1	16.41

These adjusted factors were then multiplied by 10 and rounded to the nearest whole number to represent the points available for each item. Points were allocated to standards within each item based on the relative importance of the standard. Where a standard is not applicable to a case, the points allocated to it are not included in the total points available for that item.

Burton M. Taylor
February 25, 1985

Docket Number ______________ Q. A. Number ____________ (page two)

ITEM NO.	DESCRIPTION OF ITEM	RATING	PTS AVAILABLE
1.	Complete or Incomplete	5	16
2.	Jurisdiction	4	33
3.	Recipient Status	4	33
4.	Notification to Complainant and Recipient	5	16
5.	Dual Agency/Court Complaint	5	16
6.	Pre-investigative Administrative Closure	3	66
7.	Investigative Plan	2	99
8.	Denial of Access	4	33
9.	Interviews, Follow-up on New Leads	3	66
10.	Pre-determination Administrative Closure	3	66
11.	Investigative Report	1	164
12.	Notice of Adverse Findings and Follow-up	4	33
13.	Letter(s) of Findings	1	164
14.	Post-LOF Rebuttal or Appeal	4	33
15.	Negotiations	2	99
16.	Enforcement	3	66

Total points: 1003

TAB C

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE ASSISTANT SECRETARY FOR CIVIL RIGHTS

AUG 1 - 1985

Date:
Due Dates: August 15, 1985
August 26, 1985

NOTE TO FRED CIOFFI

Re: Factors Influencing OCR's Choice of Enforcement Alternatives
Initiated Against Noncomplying Recipients

In our meeting of June 20, 1985, we discussed the above described memorandum of May 7, 1985, which, among things, had addressed the issue of determining when the initiation of administrative enforcement is appropriate. I requested your staff to review and re-draft this memorandum in light of the issues raised and the discussions that took place at that meeting. In view of approximately six weeks passing without receiving a further analysis from PES, I am requesting that such an analysis be forwarded to me as soon as possible, but no later than Thursday, August 15.

In addition, you should re-evaluate all the cases for administrative enforcement returned from the Department of Justice. Our discussions and conclusions over the last few months concerning when administrative enforcement is appropriate should be the basis of re-evaluation.

Attached for that purpose are the files in Anna-Jonesboro (#05-78-0043) and Dayton Public Schools (#15-76-0070). You should also review the Malcolm-King case (#02-83-2007) for which correspondences between OCR and DOJ is attached.

Your re-evaluation of Dillion II and your recommendations are being considered. You should complete the re-evaluation of the remaining cases by August 26, 1985.

Harry M. Singleton
Assistant Secretary
for Civil Rights

Attachments

cc: Thomasina Rogers
Ned Stutman
Stephanine White
CCU

400 MARYLAND AVE., S.W. WASHINGTON, D.C. 20202

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON D.C. 20202

NOTE TO HARRY M. SINGLETON

Re: Reevaluation of Enforcement Recommendation Against Dayton Public Schools, Dayton, Ohio, Complaint No. 15-76-0070

On November 3, 1983, the Policy and Enforcement Service (PES) recommended administrative enforcement under Title IX against Dayton Public Schools, based on the Title IX complaint of a female teacher who was passed over for promotion to the post of assistant principal. (November 3, 1983 memorandum to Harry M. Singleton, attached at Tab A). The Department of Justice earlier had declined to institute judicial enforcement in this case, for the stated reasons that no pattern and practice of discrimination had been shown, and the complainant's earlier Title VII suit had been dismissed with prejudice for failure to prosecute.

PES has reconsidered the November 3, 1983 memorandum (Tab A) to you, conveying the enforcement recommendation. We believe that the legal analysis is still correct. However, before we prepare a new recommendation for enforcement, we will need to update the facts in the complaint file. The update would include, to establish jurisdiction, a description of the Federal financial assistance received by the district, and its connection to the facts of the complaint. (I note that the earlier recommendation of PES for administrative enforcement was prepared prior to the Supreme Court's decision in Grove City v. Bell.) In addition, we would need to know (1) whether the complainant is still interested in seeking relief on the grounds alleged in her complaint and would be available to support an administrative proceeding as a witness, and (2) whether the regional office (without necessarily engaging in further investigation) has any evidence in its files that a pattern and practice of sex discrimination in the consideration of females for administrative positions exists in the school district. Attached at Tab B is a memorandum asking the Chicago Regional Office to update the file appropriately.

Jim Littlejohn
(for) Frederick T. Cioffi

Attachments:

Tab A - Memorandum dated November 3, 1983
Tab B - Memorandum to the Chicago Regional Office

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

DATE: NOV 3 1983
PURPOSE: DECISION

TO : Harry M. Singleton
Assistant Secretary
for Civil Rights

FROM : Antonio J. Califa Antonio J Califa
Director for Policy and
Enforcement Service

SUBJECT: Resubmission of Recommendation to Initiate Title IX Administrative Enforcement Proceedings Against Dayton Public Schools, Dayton, Ohio, Complaint No. 15-76-0070 -- EXECUTIVE SUMMARY

ISSUE

Whether, in light of the decision by the Department of Justice (DOJ) not to take enforcement action against the above-referenced district, the Office for Civil Rights (OCR) should now initiate administrative enforcement proceedings against the district for one or both of the following:

- for having violated Title IX of the Education Amendments of 1972 (Title IX) as a result of its discriminatory failure to promote the complainant;
- for having violated Title IX as a result of retaliating against the complainant after she filed an earlier complaint with OCR against the district.

SUMMARY

By letter dated July 23, 1983, OCR referred the above-referenced Title IX employment action to DOJ, requesting that DOJ take appropriate judicial relief. By letter dated August 9, 1983, OCR was notified of the decision by DOJ not to take enforcement action against the school district. DOJ offers two primary considerations behind its refusal to accept our referral. One relates to the fact that the action involves a complaint of discrimination against an individual, rather than evidencing a continuing pattern or practice of discrimination by the district. The other reason DOJ advances for declining the referral is the fact that the complainant had already filed a Title VII complaint in Federal court that was dismissed with prejudice for failure to prosecute. However, for the reasons articulated in the previous LEPS enforcement recommendations against Dayton involving the instant action, and reiterated herein, the Federal court judgment is not binding on us as a matter of course. LEPS recommends that administrative enforcement proceedings be initiated against Dayton forthwith.

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

DATE:
PURPOSE: DECISION

TO : Harry M. Singleton
Assistant Secretary
for Civil Rights

FROM : Antonio J. Califa
Director for Policy and
Enforcement Service

SUBJECT: Resubmission of Recommendation to Initiate Title IX Administrative Enforcement Proceedings Against Dayton Public Schools, Dayton, Ohio, Complaint No. 15-76-0070

ISSUE

Whether, in light of the decision by the Department of Justice (DOJ) not to take enforcement action against the above-referenced school district, the Office for Civil Rights (OCR) should now initiate administrative enforcement proceedings against the district for one or both of the following:

- for having violated Title IX of the Education Amendments of 1972 (Title IX) as a result of its discriminatory failure to promote the complainant;
- for having violated Title IX as a result of retaliating against the complainant after she filed an earlier complaint with OCR against the district.

SUMMARY

By letter dated July 23, 1983, OCR referred the above-referenced Title IX employment action to DOJ, requesting that DOJ take appropriate judicial relief. By letter dated August 9, 1983, OCR was notified of the decision by DOJ not to take enforcement action against the school district. DOJ offers two primary considerations for its refusal to accept our referral. One relates to the fact that the action involves a complaint of discrimination against an individual; it does not evidence a continuing pattern or practice of discrimination by the district. The other reason DOJ advances for declining the referral is the fact that the complainant had already filed a Title VII complaint in Federal court that was dismissed with prejudice for failure to prosecute. However, for the reasons articulated in the previous LEPS enforcement recommendations against Dayton involving the instant action, and reiterated herein, the Federal court judgment is not binding on us as a matter of course.

This case was forwarded to the Secretary, as one of the June 9 Adams cases, for the purpose of advising him of OCR's decision to take administrative action against Dayton. This case then paralleled the course taken by the other June 9 cases, and was referred to DOJ for appropriate judicial enforcement. Given the fact that this action was already approved for enforcement on these occasions, LEPS now reiterates its earlier series of recommendations and urges that administrative enforcement proceedings be initiated against the Dayton Public Schools for its commission of both a substantive and retaliatory Title IX violation.

BACKGROUND

I. Chronology of Events

On February 9, 1979, OCR issued a letter of findings (LOF) notifying the district that it had violated Title IX, for having failed to promote the complainant to the position of assistant principal and for having retaliated against the complainant because she had filed an earlier complaint with OCR. OCR subsequently informed the school district that, based on the Romeo decision, 1/ OCR would not pursue, at that time, the remedies for the finding of sex discrimination, but that it would pursue the remedies for the finding of retaliation. 2/ However, once the U.S. Supreme Court validated the Title IX employment regulation in North Haven, 3/ OCR informed the district that it was reopening the substantive sex discrimination aspect of the complaint. The district still refused to negotiate, asserting that the sex discrimination issue had already been litigated under Title VII in

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1/ Romeo Community Schools v. HEW, 600 F.2d 581 (6th Cir. 1979).

2/ On January 11, 1982, LEPS submitted a recommendation to initiate enforcement against Dayton Public Schools as a result of the district's retaliatory action against the complainant arising from her filing a complaint with OCR. In order to respond to the comments raised by the then Deputy Assistant Secretary regarding that enforcement recommendation, we met with district officials on March 23, 1982. As no settlement could be reached, we submitted a revised enforcement recommendation on June 25, 1982, which was disapproved by the Assistant Secretary on July 12, 1982. LEPS remains convinced, however, that the factual situation does, in fact, constitute a cognizable claim of retaliation. To the extent that both the package to the Secretary and the referral to DOJ included the retaliation aspect of the complaint (as well as substantive sex discrimination portion), we assume that the Assistant Secretary has since agreed to reconsider his earlier decision and that once the enforcement action is commenced, it will include both the Subpart E and the retaliation claims.

3/ North Haven Board of Education v. Bell, 102 S. Ct. 1912 (1982).

Federal court, and that *res judicata* barred any further action. As the following discussion will demonstrate, that judgment is not binding on us as a matter of course.

II. Evaluation of the Evidence

In January 1974, the district announced an opening for the position of "administrative intern" at the Alternative Learning Center (ALC). The complainant, Mary Montgomery, who met the qualifications listed in the announcement, was interviewed for the opening. During her interview, the complainant claims to have been informed by the Executive Director of Secondary Education that the individual selected for the internship would either be elevated, after a year of experience, to take charge of the building or become a high school assistant principal. This statement was confirmed by one of those present during the interview. In March 1974, Ms. Montgomery was selected for the internship.

Despite her increased responsibilities over the years, Ms. Montgomery's position was never upgraded, nor was she ever interviewed for nor appointed to an assistant principal position. In fact, in June 1977, the district, citing budgetary constraints, demoted her from administrative intern to her former position of classroom teacher.

The district denies it knew the complainant was interested in an assistant principalship. However, a district official told an OCR investigator that some time in 1975, the complainant informed him of her desire to be promoted to assistant principal. On three separate occasions, the complainant's supervisor submitted requests to district officials that Ms. Montgomery be promoted to assistant principal. In fact, in the last of these three memoranda, her supervisor informed district officials that the complainant's responsibilities at the ALC were comparable to those of an assistant principal in the comprehensive high school. Finally, during the relevant years (1975-76 and 1976-77), the district's policy was that the administrative intern position was an administrative or supervisory position, and that persons holding such positions did not have to apply formally for administrative openings because they were automatically placed on the district's eligibility list. 4/

4/ The district bulletins state in general: "It is our intention at this time to upgrade our present eligibility list to include those individuals who currently *do not hold administrative or supervisory positions* and who possess, or will possess . . . a certificate in one of the above categories." These bulletins invite interested persons "who wish to be included on the eligibility list" to apply. However, the Master Agreement, in effect from 1972 to 1977, at Section 27.01, specifically defines an administrative intern as a position at the administrative-supervisory level. Furthermore, bulletins announcing

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During the school years in question, 1975-76 and 1976-77, the district promoted four administrative interns to assistant principalships -- two women and two men. The two women had been appointed to the administrative intern program prior to the complainant. The complainant was next in line for a promotion. Notwithstanding her seniority, the district subsequently promoted two men -- both of whom had fewer total years of teaching experience, as well as less tenure in the administrative internship program, than did the complainant. The evidence indicates that both of these men were picked for the positions without being subject to any competitive selection process; further, it appears that the complainant was not even considered for the positions. 5/

At no time has the district contended that Ms. Montgomery was not well qualified for an assistant principalship or that her performance in her administrative internship was, in any way, unsatisfactory. Each of the reasons proffered by the district for its refusal to promote Ms. Montgomery is inconsistent with the facts discovered during OCR's investigation. 6/

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openings for assistant principal positions indicate that interviews will be held, but that administrative trainees (who are the same as an administrative interns) need not schedule another interview. Therefore, the complainant should have been placed on the district's eligibility list, and considered for any administrative openings that occurred while she was an administrative intern.

5/ Also during this period, we note that women held a low percentage of the high school assistant principal positions in the district. From 1973 to 1979, women were appointed to only six, or 26.1 percent, of the 23 vacancies at this level. As of 1979, women held only six, or 27.3 percent, of all high school assistant principalships in the district.

6/ The district claims it was unaware of the comparability of the complainant's responsibility at the Alternative Learning Center (ALC) (where she was an administrative intern) with those of an assistant principal; in fact, it denied knowing that she even desired such a promotion. Notwithstanding this purported justification, Ms. Montgomery's supervisor had, on several occasions, advised district officials of the similarity of the positions and of her interest in (and his recommendation that she be given) a promotion.

A second reason offered by the district for refusing to upgrade the complainant's position was that it ostensibly did not consider ALC a "school," and it was not staffed, therefore, with a principal.

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In addition to evidence of a Subpart E violation, there is also evidence that the district retaliated against the complainant. See Tabs A and B. The retaliation allegation resulted from the cumulative effect of the district's decision to demote the complainant from the position of administrative intern to the position of classroom teacher, and its failure to promote Ms. Montgomery from classroom teacher to "teacher on special assignment" (TOSA) or to a comparable position.

When the promotion that Ms. Montgomery had been led to believe (during her interview for the administrative internship) would come did not, she filed the instant complaint with OCR (December 1976). In May 1977, she was informed that the administrative intern program was to be abolished the following school year for budgetary reasons. Effective June 1977, her job duties as an administrative intern were terminated. Also at that time, she received written notice of the fact that she was being reassigned to the position of classroom teacher for the 1977-78 school year. 7/

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Instead, the district considered it a "center," which was staffed by a "director." Accordingly, the district continued, to the extent that ALC did not meet the standards of a comprehensive high school, it did not qualify for an assistant principal. The district's staff directories (which, during school years 1975-76 and 1976-77, replaced the term "director" for that of "principal") belie this assertion, however.

A third reason for the district's failure to promote the complainant was that the building supervisor at ALC had allegedly wanted to retain full responsibility for the center's operation. However, statements from the supervisor (obtained during OCR's investigation) and copies of the memoranda he sent to district officials contradict this assertion. In fact, he wholly supported and actively sought Ms. Montgomery's promotion to assistant principal.

Finally, the district cited the existence of a budgetary crunch to justify its failure to promote the complainant. However, as discussed, during the period the complainant sought promotion, the district promoted four others to assistant principal positions. Indeed, two of the four were appointed to newly created positions.

7/ This reassignment involved a reduction both in pay (an additional four weeks' salary to which a classroom teacher was not entitled) and status (according to the complainant, district officials deny that there was a reduction in status), and occurred despite the fact that the complainant's supervisor had repeatedly submitted requests to various district officials for the complainant to be promoted to the position of assistant principal.

There were three other individuals who had participated in the administrative internship program -- two of them, however, were not similarly situated to the complainant. Those two individuals had been temporarily appointed to the position for emergency reasons after the 1976-77 school year began; neither had been led to believe, as had the complainant, that their appointments would have promotion potential; and both, as expected, resumed their teaching positions in the 1977-78 school year.

The third administrative intern (a male) was more similarly situated to the complainant's circumstances. Although he, like the complainant, was initially returned to the classroom for the 1977-78 school year, halfway through the year he was appointed as "administrative assistant." Although that position afforded him no additional salary, it did allow him to continue receiving administrative experience. The complainant was afforded no similar opportunity and was given no option, upon the demise of the internship program, other than to return to the classroom.

The complainant notified OCR of the ostensible reemergence of an administrative program (i.e., TOSA) when she first learned about it a year after the administrative intern program ended. In informing OCR of the existence of the TOSA "program," she also indicated that three males (none of whom appeared any more qualified than she) had been selected as TOSAs. These positions had been neither publicly advertised nor otherwise directed to the complainant's attention.

OCR's subsequent investigation pointed out a remarkable similarity between the defunct administrative intern program and the newly created TOSA program. During the first year (1978-79) of the existence of TOSAs, their duties were practically indistinguishable from those performed by the administrative interns. 8/

The district again explained its suspect activity on its budgetary woes. In documenting the retaliatory activity, the complainant offered the basis for her allegation: the district effectively demoted her from administrative intern to classroom teacher, and then failed to promote

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8/ Although the district contends that TOSA was a "non-administrative" position (since no TOSA was promoted to the position of assistant principal -- although no one has been appointed to an assistant principalship since 1976), approximately five out of the six students informally surveyed by the EOS identified the TOSA as also being the assistant principal. Moreover, a former administrative intern informed OCR that he was aware of three TOSAs who were functioning as administrative interns. When asked why he thought the administrative intern position had been eliminated, he said that it had not been eliminated, but that the name had been changed to "teacher on special assignment." Further, he said that the only reason the district had made the effort to change the name of the program was because Mary Montgomery had filed a complaint.

her again to a newly established TOSA, which had unmistakably similar responsibilities to those of the administrative intern. Despite its reliance on budgetary concerns -- which were purportedly caused by the demise of the administrative intern program -- the district was still somehow able to "recreate" an administrative intern program, and to select individuals with comparable, and in some cases inferior, qualifications to those of Ms. Montgomery. *See* Tab 8, p. 5, n.12.

When the district officials were asked at a March 23, 1982 meeting with OCR why they had failed to promote, or even consider Ms. Montgomery for a TOSA position, the repeated response was that she was not at one of the schools where a principal had *asked* for a TOSA. Apparently, TOSAs are only appointed by the principal at the school where the individual is already assigned (*i.e.*, no staff increases are involved). Also, until school year 1981-82, TOSAs had only been used at secondary schools paired for desegregation purposes. What the district seems to have ignored, however, is that it could have transferred the complainant to a different school -- one which was to be paired for desegregation purposes -- so that she could have been selected for the TOSA experience. 9/ The district's reasoning thus fails to rebut the conclusion that its justification for not promoting Ms. Montgomery is nothing more than a pretext.

Negotiations have been attempted, but have failed to reach any settlement. The district denies it discriminated against the complainant and further contends that a previous Title VII action in Federal court resolved the issue. This issue will be addressed in the Discussion, Part II, pp. 9-11.

The school district is currently in receipt of the following Federal funds: Impact Aid, 10/ Adult Basic Education, ECIA - Chapter 1, ECIA - Chapter 2, Education for the Handicapped, School Lunch, and Vocational Education.

9/ Even if she had not been transferred originally to a school in need of a TOSA, the district could have assigned her subsequently to such a school to teach, thereby enabling her to receive a TOSA appointment. This identical procedure was indeed carried out for one of the original TOSA appointees (who was also one of the two "emergency" replacements for the administrative intern program during 1976-77).

10/ Given the district's receipt of Federal Impact Aid and Vocational Education (since the ALC, to which Ms. Montgomery was assigned, provided vocational training, at least in part), we should be able to pursue this action, notwithstanding the need for a *Grove City* analysis. At a minimum, the federally-supported programs are "infected" by the discriminatory environment created by the

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DISCUSSION

In addition to establishing a case of sex discrimination (and the basic elements of a prima facie case of retaliation -- see Tab B, pp. 7-10) against the school district, a separate inquiry must be made concerning the decision by the Federal district court in Ohio, dismissing the Title VII action brought by the complainant. The question is whether that action precludes OCR from proceeding to enforcement with the instant case because of res judicata and collateral estoppel. We conclude that it does not.

I. Establishing a case of sex discrimination

Given the paucity of case law on the standards for establishing a case of sex discrimination under Title IX, it is appropriate to analogize to the relevant case law under Title VII. The U.S. Supreme Court has ruled that a plaintiff suing under Title VII has the initial burden of establishing a prima facie case of discrimination. The moving party must, therefore, demonstrate that: 1) she is a member of a protected class; 2) she applied for or sought promotion to a particular position, in which there was a vacancy and for which she was qualified; 3) she was rejected for the position; and 4) afterwards, the job remained open and the employer continued to consider others for the position. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978); McDonnel Douglas Corp. v. Green, 411 U.S. 792 (1973). After the plaintiff establishes a prima facie case, the burden shifts to the defendant "to articulate some legitimate non-discriminatory reason for the employee's rejection." McDonnell Douglas Corp., supra at 802. See Burdine, supra. Assuming that requirement is satisfied, the plaintiff has a final opportunity to prove that the defendant's purported legitimate reason is a mere pretext for the resultant discriminatory activity. McDonnell Douglas Corp., supra at 804-805. See Burdine, supra; Furnco Construction Corp., supra.

In the instant action, the factual situation amply supports a prima facie case of discrimination. In addition, there is adequate documentation to conclude that the district's stated reasons for failing to promote the complainant indeed are pretextual. As a female employee within the recipient district, the complainant is a member of the protected class under Title IX. See North Haven Board of Education v. Bell, supra at

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discrimination against the complainant. See Board of Public Instruction of Taylor County v. Finch, 414 F.2d 1068, 1078 (5th Cir. 1968). In her administrative intern capacity, she was responsible for the operation of ALC and was likely to have administered the federally-funded programs operated at that school.

1918. Even though the complainant did not apply *per se* for a particular assistant principal position, the district was well aware of her interest in and qualifications for such a position. It certainly should have considered her when such positions arose during her tenure as an administrative intern. However, not only did the district fail to consider her for a position at ALC -- and eventually demote her to classroom teacher -- but also it promoted two men, both with less seniority in the administrative intern program and less experience overall, to assistant principalships.

The district proffered several "legitimate nondiscriminatory reasons" for its failure to promote the complainant. *See* pp. 4-5, n.6, *supra*. As previously discussed, each reason is inconsistent with the facts uncovered and deduced during OCR's investigation. It seems clear, therefore, that the reasons are merely pretexts for the resultant discrimination. Thus, the evidence sufficiently establishes a *prima facie* case of discrimination, for which the district has been unable to articulate any non-pretextual, legitimate reasons.

II. The applicability of the doctrine of res judicata

In addition to denying any unlawful discrimination against Ms. Montgomery, the district has repeatedly claimed that OCR is estopped from maintaining this action because of the doctrine of *res judicata*. The district contends that her sex discrimination allegation was litigated previously under Title VII in the U.S. District Court for the Southern District of Ohio (Civil Action No. C-3-77-328).

The doctrine of *res judicata* holds that a judgment on the merits in a prior suit bars a second suit on the same cause of action involving the same issues and parties. 11/ *See*, *e.g.*, *Lawlor* v. *National Screen Service*

11/ In support of its position, the district cites *Kremer* v. *Chemical Construction Corporation*, 102 S. Ct. 1883 (1982). In that case, the Supreme Court held that a Federal court considering a Title VII employment discrimination complaint was required to give preclusive effect to a state court decision upholding a state administrative agency's rejection of the discrimination claims. In *Kremer*, however, unlike the instant situation, the parties to both actions were identical.

DOJ, in refusing to accept OCR's referral of the case, in part, on the basis of *res judicata*, cited *EEOC* v. *Huttig, Sash & Door Co.*, 511 F.2d 453 (5th Cir. 1975). The court concluded that, even after termination of a charging party's private suit, the EEOC can bring suit predicated on, but not limited to, the same charge. Notwithstanding this general proposition, the court applied the facts of the case before it and held that the EEOC would be barred, under *res judicata* principles, from filing suit on that particular charge

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Corporation, 349 U.S. 322 (1955); *Parklane Hosiery Co., Inc.* v. *Shore*, *439 U.S. 322* (1922). Ms. Montgomery did file a complaint in district court. The complaint did allege that the district's failure to promote her constituted unlawful discrimination against her. She brought the action under Title VII, however. The case ultimately was dismissed with prejudice for failure to prosecute. However, no evidence was presented and no findings were made as to the merits of the case.

For *res judicata* purposes, a dismissal with prejudice for failure to prosecute is generally considered a judgment on the merits. Fed. R. Civ. P. 41(b); *Bierman* v. *Tampa Electric Co.*, 604 F.2d 929 (5th Cir. 1979). The doctrine should not serve as a bar to the present action, however, because the Assistant Secretary for Civil Rights, the moving party in the administrative action, was not a party to the district court proceeding -- there is no privity between the Assistant Secretary and the complainant.

In order to justify the application of either collateral estoppel 12/ or *res judicata*, both "the judicially determined matter and the proceeding under consideration [must] have a strict mutuality of parties and issues." *In the Matter of Perry County School District*, Administrative Proceeding, *U.S. Department of Education*, Docket No. 80-VI-2, March 5, 1981.

In addition, it is significant to draw attention to the different purposes behind Title IX and Title VII. While both are antidiscrimination statutes, Title IX is enforced to ensure that no Federal monies are used to support discriminatory activities operated by a recipient. Title IX actions are pursued to protect the public interest. Title VII actions, on the other hand, are maintained in order to rectify the injustice committed against the individual whose civil rights have been threatened. Although the gravamen of the Title VII and Title IX violation may be identical, the interests to be protected by these two statutes are distinct. The complainant's Title VII action was based on her interest in securing a personal remedy for the discrimination. In an administrative proceeding, OCR's Title IX action would be based on the Assistant Secretary's interest

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and on behalf of the person who had had the suit adjudicated. This Fifth Circuit case is distinguishable from the instant action. Whether the EEOC or the individual claimant pursues an action under Title VII, an individual remedy is sought. Even though Ms. Montgomery filed an earlier claim under Title VII, the instant Title IX action involves a different party, *i.e.*, the Department of Education, and seeks to rectify different interests.

12/ Collateral estoppel precludes relitigating a different cause of action involving issues that were both actually litigated and necessary to the outcome of a prior action. *See*, *e.g.*, *Lawlor*, *supra*; *Parklane Hosiery*, *supra*.

in assuring that Federal financial assistance does not support a discriminatory program or activity. The ultimate remedies in Title VII and Title IX actions are not necessarily the same -- in fact, there are times when the Title IX remedy (*i.e.*, termination) is acceptable to OCR, but may not satisfy or provide restitution for the complainant.

It is also important to note that collateral estoppel and *res judicata* "are not to be rigidly applied." *Perry County, supra* at 7. *See also, Shinman* v. *Frank*, 625 F.2d 80, 89 (6th Cir. 1980). If the result of applying either doctrine would be to contravene overriding public policy or to result in manifest injustice, then courts have held that these doctrines should not apply. *Tipler* v. *E.I. Dupont Nemours and Co.*, 443 F.2d 125, 128-129 (6th Cir. 1971); *Perry County, supra*. Clearly, it would contravene public policy to preclude OCR from pursuing the public's interest in seeking to prevent the distribution of discriminatorily affected Federal funds, solely because a different plaintiff seeking a different remedy failed to prosecute her claim. "[T]he implications of barring a civil rights claim on *res judicata* grounds deserve careful consideration. [Citations omitted.]" *Perry County, supra* at 8.

Thus, not only because the parties and issues in the two proceedings are different, but also because it could contravene public policy, it would be inappropriate to apply either *res judicata* or collateral estoppel to bar the enforcement of this action. As a final note, we should also decide whether to notify the complainant and the district, inasmuch as a ten-day letter was sent on June 9, 1983, warning the district of the impending referral to DOJ for appropriate judicial relief. In light of the above, we recommend that an administrative proceeding be initiated against Dayton Public Schools.

DECISION

Approve ______________________ Date ________________

Disapprove ____________________

Comments/Other ______________________________________

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ATTACHMENTS

Tab A: Title IX Enforcement Recommendation against Dayton Public Schools, Ohio, from Antonio J. Califa to Clarence Thomas, dated January 11, 1982

Tab B: Revised Title IX Enforcement Recommendation against Dayton Public Schools, Ohio, from Antonio J. Califa to Harry M. Singleton, dated June 25, 1982

Prepared by: LEPS:Litigation:GReizenstein:245-0192:#50

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

DATE:

TO: Clarence Thomas
Assistant Secretary
for Civil Rights

FROM: Antonio J. Califa AJCalifa
Director for Litigation, Enforcement
and Policy Service

SUBJECT: Recommendation for Title IX Enforcement Action Against
Dayton Public Schools, Dayton, Ohio, No. 15760070 . . . DECISION

After reviewing Region V's Recommendation to take Administrative Action and the Regional Civil Rights Attorneys Unit's Litigation Report, Litigation, Enforcement and Policy Service concurs in the recommendation to take administrative action against Dayton Public Schools, Ohio.

BACKGROUND

The complainant, Mary Montgomery, initially alleged that the Dayton Public Schools discriminated against her on the basis of race and sex by failing to promote her from the position of administrative intern to the position of assistant principal. In addition, the complainant alleged that the school district retaliated against her for having filed a complaint with OCR by demoting her from the position of administrative intern to the position of classroom teacher.

On December 28, 1976, OCR received Ms. Montgomery's original complaint which included the race and sex discrimination charges. At that time, she was employed in the district as an administrative intern, a position which district officials led her to believe would eventually lead to a promotion to assistant principal or a similar position. 1/ When the expected promotion was not forthcoming, she filed the immediate complaint with OCR. 2/

1/ Several documents in Region V's Litigation Report, including the State commission hearing examiner's decision, indicate that complainant was led to believe that she would eventually be promoted to a higher administrative position.

2/ Complainant also filed complaints with the EEOC on September 26, 1976 (based on Title VII of the Civil Rights Act of 1964) (Title VII) and with the Ohio Civil Rights Commission (OCRC) on June 28, 1977 (also based on Title VII, but including the retaliation charge, which was not filed with the EEOC). On May 20, 1977, the EEOC issued a "no probable cause" determination

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On May 23, 1977, complainant was informed that the administrative intern program was to be abolished the following school year for budgetary reasons. Effective June 29, 1977, therefore, her job duties as an administrative intern were terminated. Also on that day, Ms. Montgomery received written notice of the fact that she was being reassigned to the position of classroom teacher for the 1977-78 school year. 3/ It is her assertion that the demotion occurred as of September 6, 1977, when she actually started teaching, rather than as of the date she received notice of the reassignment. See footnote 10, infra.

Based on the evidence secured during the on-site investigation, OCR issued an LOF on February 9, 1979, in which both race and sex employment discrimination violations were cited, as well as a retaliatory demotion. 4/ An additional on-site was conducted to focus on the retaliation aspect of the complaint. 5/

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on the charge of discrimination. On June 27, 1980, a Hearing Examiner recommended to the OCRC that the complaint be dismissed. OCRC followed the recommendation and dismissed the action on October 6, 1980. Whether the instant action is, or may be, barred by either the doctrine of res judicata or collateral estoppel will be discussed infra.

3/ This reassignment involved a reduction in pay (an additional four weeks salary to which a classroom teacher was not entitled) and status, and occurred despite the fact that the complainant's supervisor had repeatedly submitted requests to various district officials for complainant to be promoted to the position of assistant principal.

4/ The demotion of Ms. Montgomery was one of the factors contributing to OCR's original determination of the district's ineligibility for ESAA funding for the 1978-79 school year, since OCR then believed that the demotion was a result of race (and sex) discrimination. Subsequent to the show cause hearing and during settlement negotiations, OCR's determination regarding Ms. Montgomery's demotion was withdrawn for ESAA purposes when the school district agreed to major procedural changes that would remedy the cited compliance violations (although they were not directly related to her demotion). OCR agreed not to pursue the charge of retaliation for having filed a race discrimination complaint.

5/ On July 31, 1980, OCR informed the district that while it no longer had jurisdiction over the sex discrimination complaint (because of the decision in Romeo Community Schools v. HEW, 438 F. Supp. 1021 (E.D. Mich. 1977), aff'd, 600 F.2d 581 (6th Cir. 1979)), it did maintain jurisdiction over, and would continue to pursue, the retaliation aspect of the complaint.

There were three other individuals who had participated in the administrative internship program; however, two were not similarly situated to the complainant. Those two had been temporarily appointed to the position for emergency reasons after the 1976-77 school year had already begun; neither had been led to believe, as had the complainant, that their appointments would have promotion potential; and both of these individuals, as expected, resumed their teaching positions in the 1977-78 school year.

The third administrative intern (a male) was more similarly situated to the complainant's circumstances. Although he, like complainant, was initially returned to the classroom for the 1977-78 school year, halfway through the year, he was appointed as "administrative assistant," a position which, although affording him no additional salary, allowed him to continue receiving administrative experience. The complainant was afforded no similar opportunity and was given no option upon the demise of the internship program other than returning to the classroom.

As OCR's investigation progressed, it became increasingly evident that whereas the administrative intern program may have been eliminated at the end of the 1976-77 school year on paper, in fact it was subsequently resurrected under a different program heading. During the 1978-79 school year, three males served in the position of "teacher on special assignment" (TOSA). Like the 1976-77 administrative interns, the 1978-79 TOSAs performed administrative duties and assisted their respective principals/supervisors, received extra pay (16 additional days), were under supplemental contracts, and did not perform any classroom teaching. 6/

Whereas the district contends that the administrative intern program was abolished because of budgetary constraints, the TOSA appointees received essentially the same additional payment as the administrative interns and performed essentially the same administrative duties. Whatever reasons the district may have actually had for returning the complainant to the classroom, it sought to justify this action by relying on the ostensible elimination of

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6/ Not only did an interview with the district's assistant superintendent of administration (on December 14, 1978) suggest that a TOSA is essentially the same position as was held by the former administrative intern, but also when shown the duties of a TOSA, one of the former interns identified them as being those of an administrative intern. Disclaiming this comparison, the district repeatedly pointed to the fact that all four of the 1976-77 interns were returned to the classroom at the end of that academic year because of budgetary limitations. Moreover, rigidly adhering to its contention that OCR lacks jurisdiction, the district has not, to date, responded to OCR's last correspondence, dated May 18, 1981, attaching a copy of the February 11, 1981 letter ostensibly never received by the district, in which OCR explained that the *Romeo* case does not apply to retaliation cases, that OCRC did not consider all the evidence OCR considered, and that OCR is not legally bound by the decisions of the OCRC.

the intern program. Notwithstanding the apparent similarity between the two programs, and the fact that Ms. Montgomery was highly qualified for any of the administrative positions subsequently made available, she was neither chosen nor even considered for a TOSA position. The district's reliance on budgetary problems is, therefore, highly suspect; it would seem more likely that her demotion was, in fact, provoked by her filing the complaint with OCR.

Once the race and sex discrimination charges were dismissed and with only the Title IX retaliation issue remaining, the district was given the opportunity to remedy the violation through: 1) promotion of the complainant to the administrative intern, or a comparable (e.g., TOSA), position; and 2) retroactive pay to the complainant in the amount of the difference between her salary as a classroom teacher and the salary she would have received as an administrative intern. The district has refused to institute these remedies, however, relying upon the Romeo decision, as well as the decision of the State agency which dismissed the retaliation complaint; either of these decisions, the district argues, resolves the matter.

DISCUSSION

In addition to establishing the basic elements of a prima facie case of retaliation, two separate inquiries must be made. Assuming retaliation can be established, does the Sixth Circuit's decision in Romeo, supra, striking down OCR's Subpart E Title IX employment jurisdiction, similarly curtail our jurisdiction to handle complaints of retaliation emanating from the filing of Title IX employment complaints? Does the final decision by the State commission (OCRC) dismissing the retaliation complaint preclude OCR's authority to proceed to enforcement with the instant complaint because we could be barred by the doctrines of res judicata and collateral estoppel? As will be discussed infra, neither of these [illegible] obstacles would necessarily enjoin our administrative proceedings; failure to take this violation to enforcement would, however, create a chilling effect on Title IX's efficacy as a remedial tool.

The establishment of a prima facie case of retaliation requires a showing that: 1) the employee engaged in protected activity; 2) the employer was aware of the protected activity; 3) there were different conditions of employment before and after the protected activity; and 4) the negative conditions followed the protected activity within such a period of time as to give rise to an inference of retaliatory motivations. Kralowec v. Prince George's County, 503 F. Supp. 985 (D. Md. 1980); Hochstadt v. Worcester Foundation for Experimental Biology, Inc., 425 F. Supp. 318 (D. Mass. 1976), aff'd, 545 F.2d 222 (1st Cir. 1976); In the Matter of Camden County Schools and Georgia Dept. of Education, Administrative Proceeding, U.S. Department of Education, Docket No. 80-VI-3, 80-IX-3 (September 4, 1981). Once a prima facie case has been demonstrated, the burden shifts, and the party having taken the adverse action must show a legitimate, nondiscriminatory reason for such action. If such a reason is shown, the moving party has an opportunity to demonstrate that the stated reasons are merely pretextual. Texas Dept. of Community Affairs v. Burdine, 450 U.S. ___, 101 S.Ct. 1089 (1981); Camden County Schools, supra.

Under 34 C.F.R. § 106.71 7/ of Title IX's implementing regulation (which adopts and incorporates by reference the Title VI prohibition against retaliation, at 34 C.F.R. § 100.7(e) 8/), any person who "has made a complaint . . . under this part" is protected against retaliation for such activity. Therefore, when Ms. Montgomery filed a Title IX complaint with OCR on December 28, 1976, she was engaging in a protected activity.

The district disputes this proposition, however. Relying upon the *Romeo* decision, it argues that since OCR lacks jurisdiction over the complainant's Title IX employment discrimination complaint, it similarly lacks jurisdiction over the retaliation complaint which evolved from the initial complaint. Without the substantive jurisdiction, the district rejects the assertion that Ms. Montgomery was engaging in activity protected under Title IX. The Sixth Circuit decision in *Romeo*, *supra*, invalidated Subpart E of the Title IX regulation, thereby restricting OCR's jurisdiction over employment practices. But since it did not specifically address the retaliation regulation (which is not found in Subpart E), the scope of that decision cannot be so broadly construed as to effectively eliminate OCR's jurisdiction over complaints of retaliation as well. That is to say, *Romeo* does nothing to diminish the protection against retaliation afforded an individual filing a complaint under Title IX.

The importance of the retaliation regulation is that it protects access to the processes available under Title IX. Inasmuch as it is intended to be more of a procedural safeguard than a substantive remedy per se, a complainant who files a Title IX complaint, under circumstances similar to those of Ms. Montgomery's, is protected against retaliation for filing that complaint, even if OCR is ultimately found to lack jurisdiction over the original complaint involving employment discrimination. In the instant case, Ms. Montgomery had filed her original complaint in 1976, before the district court had

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7/ Section 106.71 states:

> The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 C.F.R. 100.6 - 100.11 and 34 C.F.R. Part 101.

8/ Section 100.7(e) (*Intimidatory or retaliatory acts prohibited*) states in pertinent part:

> No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by . . . the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part . . . .

made its decision in *Romeo*, *supra*, and at a time when OCR was still routinely accepting and investigating Subpart E employment cases. Under the circumstances, Ms. Montgomery's filing of a Title IX employment discrimination complaint was an appropriate course of action and constituted activity protected by the Title IX retaliation regulation. A school district should not be permitted to retaliate against a person because he or she filed a complaint with OCR about a practice prohibited by one of our regulations, and then seek to immunize itself when the regulation happens to be subsequently invalidated.

Section 100.7(e) (and Section 106.71, through incorporation by reference) protects against two types of retaliation ("opposition" and "participation"). Like those provisions, Title VII provides broad protection against retaliation and contains analogous clauses describing the protected classes. It is the so-called "participation clause" (which protects those who, *inter alia*, file a charge under the statute) which our attention is focused on for purposes of demonstrating that this complainant's activity was protected. 9/ The similarity of the language in Section 100.7(e) and Section 704(a) of Title VII, and the shared purposes of the two civil rights provisions, make judicial construction of the one applicable to the other. The *Sias* case, *supra*, noted that the purpose of the participation clause "is to protect the employee who utilizes the tools provided by Congress to protect his rights. If the availability of that protection were to turn on whether the employee's charge were ultimately found to be meritorious, resort to the remedies provided by the Act would be severely chilled." 588 F.2d at 695. Similarly, under Title IX, this chilling effect would also occur if the availability of the protection were to turn on whether the employee's underlying charge (which *was* within OCR's jurisdiction at the time the complaint was filed) was later undermined by subsequent case law. Moreover, even if our retaliation jurisdiction were conditioned on the initial complaint's having been made in good faith, section 100.7 (e) would clearly protect Ms. Montgomery, since she filed the complaint with OCR with a reasonable belief that the facts were as she stated them and that OCR regulations prohibited the conduct of which she complained. *See Berg* v. *LaCorsse Cooler Co.*, 21 EPD Paragraph 30, 542 (7th Cir. 1980)(the plaintiff was "an educated

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9/ There are a number of Title VII cases which stand for the proposition that the validity of the original claim need not be established in order to secure protection from retaliatory acts. *See EEOC* v. *Virginia Carolina Veneer Corp.*, 195 F. Supp. 775, 778 (W.D. Va. 1980)("section 702(a) protects employees from employer retaliation for filing complaints with EEOC, even if the charges are false and malicious"); *Sias* v. *City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978)("It is well settled that the participation clause shields an employee from retaliation regardless of the merit of his EEOC charge"); *Equal Employment Opportunity Commission* v. *Kallir, Phillips, Ross, Inc.*, 401 F. Supp. 66, 70 (S.D. N.Y. 1975)("an employee need not establish the validity of his original claim to establish a charge of employer retaliation for having made the original charge or otherwise engaging in conduct protected by Section 704(a)"). *See also Pettway* v. *American Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir. 1969).

and informed layperson who should not be burdened with the sometimes impossible task of correctly anticipating how the Supreme Court may interpret a particular statute . . . . Her opinion was based upon reasonable belief and her opposition should be protected from retaliatory discharge").

The complainant filed her complaint on December 28, 1976. On January 12, 1977, the district was notified that a complaint had been filed alleging race and sex discrimination against one of its employees for failure to promote, although Ms. Montgomery's name was not specifically mentioned. A letter from the school district, dated March 3, 1977, indicates that at least as early as February 28, 1977, the district was aware that Ms. Montgomery was the complainant. After the on-site investigation was conducted (March 10-11, 1977) and when the district notified the complainant that she was being returned to the classroom (in June of 1977), the district was certainly aware of the complainant's protected activity, *i.e.*, her filing a complaint with OCR.

The courts have held that any reassignment of a teacher or school staff member under which he or she receives less pay, holds less responsibility, or is required to have a lesser degree of skill constitutes a demotion. *Singleton v. Jackson Separate Municipal School District*, 419 F.2d 1211 (5th Cir. 1969), *cert. denied*, 396 U.S. 1032 (1970); *In the Matter of Perry County School District and Mississippi State Department of Education*, Administrative Proceeding, U.S. Department of Education, Docket No. 80-VI-2 (March 5, 1981). Transferring Ms. Montgomery from administrative intern to classroom teacher involved reassigning her to a position for which she received less pay, held less responsibility and was required to have a lesser degree of skill. As such, this reassignment constituted a demotion and occurred subsequent to her protected activity.

Finally, the complainant's demotion to classroom teacher occurred five months after the district had first learned of her complaint and three months after OCR's on-site investigation. Moreover, her demotion occurred at the end of the academic year, presumably the earliest time at which such a reassignment would occur. This change in her employment status, therefore, followed her protected activity, and the district's awareness of this activity, within a short enough period of time that a court could infer retaliatory motivation.

Having thus established the necessary elements to submit a prima facie case of retaliation, the next step is to consider any legitimate, nondiscriminatory reasons offered by the district for its adverse action against the complainant. The district's position is that it did not demote Ms. Montgomery as a retaliatory act, but for financial reasons. It purports to support this assertion by pointing to the fact that all four 1976-77 administrative interns were returned to the classroom at the end of that year. However, as previously noted, two of these interns were temporarily appointed to the position for emergency reasons, fully expecting to return to their classrooms at the end of the year, and the third individual was appointed as an "administrative assistant" halfway through the 1977-78 school year, while the complaint was offered no similar option. Moreover, the evidence indicates that during the 1977-78 and 1978-79 school years, several individuals served as administrative interns or "teachers on special assignment" (TOSAs), neither of which were made available to the complainant. In view of the fact that positions comparable to the administrative intern position held by the complainant in 1976-77 continued to be filled in 1977-78 and 1978-79, coupled with the fact that prior to her filing the complaint with OCR, the complainant had received high evaluations for her performance as an administrative intern as well as requests by her supervisor for her to be promoted, the district's stated justification for its demotion of Ms. Montgomery (namely, budgetary constraints) is a mere pretext for retaliation.

The remaining issue concerns the impact of and deference to be given the decision of the Ohio Civil Rights Commission. The complainant filed a charge with the OCRC on June 28, 1977. After an investigation was conducted and probable cause was found, OCRC issued a formal complaint on July 10, 1979, alleging that the demotion was in retaliation for the complainant's filing a discriminatory complaint with the EEOC in 1976. The Hearing Examiner subsequently recommended that OCRC dismiss the case both on jurisdictional and substantive grounds. 10/ The OCRC dismissed the case on October 6, 1980.

The OCRC did not, however, fully explore the evidence to the same extent that OCR did. Because of its more limited investigation, OCRC was unable to demonstrate that the "teacher on special assignment" program was essentially a substitute for the administrative intern program. Their investigation did not continue into the 1978-79 school year, as did OCR's, and therefore, could not reach the same conclusion, *i.e.*, that the 1978-79 TOSA positions were comparable to the 1976-77 administrative intern positions, despite the different job titles.

In order to justify the application of either collateral estoppel or *res judicata*, both "the judicially determined matter and the proceeding under consider-

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10/ The recommendation to dismiss the complaint on procedural grounds was based on a State statute of limitations. The OCRC was required to issue a formal complaint within two years after the alleged unlawful discriminatory practices were committed. The complainant argued that the retaliatory demotion took place on September 6, 1977 (the date she actually returned to the classroom), whereas the district argued -- successfully -- that it occurred, if at all, on June 29, 1977, when she received written notice of the reassignment. The Hearing Examiner, having determined that the statute of limitations expired as of June 28, 1979, granted the district's Motion to Dismiss. He also decided the case on the merits and found that the district's reliance upon budgetary concerns was valid, and that it was enough that the district could demonstrate that all four of the 1976-77 administrative interns were returned to classroom teaching assignments at the end of the year. Based on this evidence (which was not as complete as that produced by OCR's more exhaustive investigation), the Hearing Examiner concluded that there were legitimate, nondiscriminatory reasons for the demotion which were not merely pretextual.

ation [must] have a strict mutuality of parties and of issues." Perry County, supra, at 7. The parties to the OCRC proceeding were the complainant and the school district; the moving party in the immediate proceeding is the Assistant Secretary for Civil Rights, not a party to the OCRC proceeding. Furthermore, the issues in the two proceedings differ; the OCRC action involved an allegation of retaliation for having filed a Title VII complaint, whereas the instant action involves Title IX, and the remedy sought would be the denial of Federal funds to a recipient who has restricted access to OCR's administrative processes. Moreover, collateral estoppel and res judicata "are not to be rigidly applied." Perry County, supra, at 7. See also Solomon v. Frank, 625 F.2d 80, 89 (6th Cir. 1980). If the result of applying either doctrine would be to contravene overriding public policy or result in manifest injustice, then courts have held that these doctrines should not apply. Tipler v. E.I. Dupont Nemours and Co., 443 F.2d 125, 128-9 (6th Cir. 1971); Perry County, supra. "[T]he implications of barring a civil rights claim on res judicata grounds deserve careful consideration. [Citations omitted.] . . . [I]t would be impossible for the statute to be implemented if persons were subject to threats, coercion or retaliation. For that reason alone it [may not be] in the public interest to apply the doctrines of collateral estoppel or res judicata even if they technically were applicable." Perry County, supra, at 8. Thus, not only because the parties and issues in the two proceedings are at variance, but also because it would contravene public policy to eliminate the protection against threats, coercion or retaliation afforded an individual filing a Title IX complaint, it would be, therefore, inappropriate to apply either res judicata or collateral estoppel to bar the enforcement of this action.

CONCLUSION

Having established not only a prima facie case of retaliation, but also that the district's proffered "legitimate, nondiscriminatory reasons" are no more than pretexts, we conclude that the district is in violation of Title IX and the implementing regulation. The fact that a decision has been rendered by a State agency does not, in and of itself, dispose of the matter. Not only are the two proceedings not identical, but also it would not be in the public interest for us to close our file in this matter. The case involves more than just a retaliatory demotion of an individual; it also involves ensuring accessibility to OCR's administrative processes. "[U]nremedied retaliation has a long-term chilling effect upon the willingness of the persons against whom the retaliation was directed and others to utilize their rights under the [Act]." Brief on Behalf of the Assistant Secretary for Civil Rights, In the Matter of Camden County Schools, Georgia, supra, at 31.

RECOMMENDATION

Because our efforts to achieve voluntary compliance have proved unsuccessful, we recommend that OCR initiate enforcement proceedings against the Dayton Public Schools.

DECISION

Approved ______________________________

Disapproved ______________________________

Other ______________________________

Date ______________________________

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

DATE
PURPOSE: ACTION

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TO : Harry M. Singleton
Acting Assistant Secretary
for Civil Rights

FROM : Antonio J. Califa
Director for Litigation, Enforcement
and Policy Service

SUBJECT: Revised Recommendation for Title IX Enforcement Action Against
Dayton Public Schools, Dayton, Ohio, OCR No. 15760070 --
EXECUTIVE SUMMARY

This action involves the school district's failure to promote the complainant in retaliation for her previously having filed a complaint with OCR. Although Ms. Montgomery had initially filed a complaint in which she alleged substantive race and sex discrimination charges as well as a subsequent retaliation charge, OCR eventually dropped both of the initial allegations -- the race discrimination issue was resolved as a result of ESAA negotiations and the sex discrimination issue was dropped after a decision was rendered in *Romeo Community Schools* v. *HEW*, 438 F. Supp. 1021 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir. 1979) (where it was determined that OCR did not have general jurisdiction over complaints of sex discrimination in employment). OCR advised the parties to the action that only the retaliation aspect of the complaint would be pursued. When OCR staff recently met with district officials, the discussion focused on the retaliation issue, since the substantive sex discrimination issue had been cast aside. On May 17, 1982, the Supreme Court upheld the validity of Subpart E of the Title IX regulations, thereby reversing, by implication, the *Romeo* decision. *North Haven Board of Education* v. *Bell*, No. 80-986. Inasmuch as the regions have been advised to contact all complainants whose Subpart E complaints were closed, never opened, or put on "hold," to determine whether they want OCR to pursue their cases, it is likely that the substantive sex discrimination aspect of the original complaint filed by Ms. Montgomery will be reactivated in due course. The district, however, unequivocally denies that Ms. Montgomery was the victim of any type of discrimination, either substantive sex discrimination or retaliation. In the meantime, therefore, the immediate issue, *i.e.*, retaliation, should be taken to enforcement, as the district has given every indication that they have no intention of settling this matter voluntarily.

MEMORANDUM UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

DATE:
PURPOSE: ACTION

TO : Harry M. Singleton
Acting Assistant Secretary
for Civil Rights

FROM : Antonio J. Califa
Director for Litigation, Enforcement
and Policy Service

SUBJECT: Revised Recommendation 1/ for Title IX Enforcement Action
Against Dayton Public Schools, Dayton, Ohio, OCR No. 15760070

ISSUE

Whether the school district retaliated against Mary Montgomery, the complainant, in violation of Title IX and its implementing regulation, when it failed to promote her, after she had filed a complaint of discrimination with OCR against the district.

SUMMARY OF SPECIFIC RECOMMENDATIONS

After reviewing Region V's Recommendation to take Administrative Action and the Regional Civil Rights Attorneys Unit's Litigation Report, LEPS concurs in the recommendation to take administrative action against Dayton Public Schools, Ohio, for failing to promote the complainant, Mary Montgomery, from the position of classroom teacher to "teacher on special assignment" (TOSA), or to a comparable position.

BACKGROUND

The complainant, Mary Montgomery, initially alleged that the Dayton Public Schools discriminated against her on the basis of race and sex by failing to promote her from the position of administrative intern to the position of assistant principal. 2/ In addition, the complainant alleged that the school

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1/ The original enforcement recommendation (attached at Tab A) was submitted by the Litigation, Enforcement and Policy Service (LEPS) to the then Assistant Secretary on January 11, 1982. On January 20, 1982, we received comments about the recommendation from Michael Middleton (attached at Tab B). As a result of Mr. Middleton's comments, we met with district officials on March 23, 1982, at which time the district's current position was ascertained; also raised at that meeting was the possibility of resuming negotiations, but according to the district's attorney, "the superintendent has no interest in conciliating this matter . . . ."

2/ It is important to keep in mind that the following positions, which are comparable in substance, are, for whatever the district's reasons may be, expressly labeled differently: administrative intern, administrative assistant and "teacher on special assignment."

district retaliated against her for having filed a complaint with OCR, by demoting her from the position of administrative intern to the position of classroom teacher.

On December 28, 1976, OCR received Ms. Montgomery's original complaint which included the race and sex discrimination charges. At that time, she was employed in the district as an administrative intern, a position which at least one district official led her to believe would eventually lead to a promotion to assistant principal or a similar position. 3/ When the expected promotion was not forthcoming, she filed the immediate complaint with OCR. 4/ On May 23, 1977, complainant was informed that the administrative intern program was to be abolished the following school year for budgetary reasons. Effective June 29, 1977, therefore, her job duties as an administrative intern were terminated. Also on that day, Ms. Montgomery received written notice of the fact that she was being reassigned to the position of classroom teacher for the 1977-78 school year. 5/ Based on the evidence secured during the first on-site investigation, OCR issued an LOF on February 9, 1979, in which both race and sex employment discrimination violations were cited, as

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3/ Several documents in Region V's Litigation Report, *e.g.*, the State commission hearing examiner's decision and an OCR interview with the person who interviewed Ms. Montgomery for the administrative intern position, indicate that complainant was indeed led to believe that she would eventually be promoted to a higher administrative position. When this was repeated at the March 23 meeting in Dayton, one of the district officials could only respond by stating, "Well, what right did her supervisor have to tell her that at the interview for the administrative intern position?"

4/ Complainant also filed complaints with the EEOC on September 20, 1976 (based on Title VII of the Civil Rights Act of 1964) (Title VII) and with the Ohio Civil Rights Commission (OCRC) on June 28, 1977 (also based on Title VII, but including a retaliatory demotion charge, which was not filed with the EEOC). On May 20, 1977, the EEOC issued a "no probable cause" determination on the charge of discrimination. On June 27, 1980, a Hearing Examiner recommended to the OCRC that the complaint be dismissed. OCRC followed the recommendation and dismissed the action on October 6, 1980. Whether the instant action is, or may be, barred by either the doctrine of *res judicata* or collateral estoppel will be discussed *infra*.

5/ This reassignment involved a reduction in both pay (an additional four weeks' salary to which a classroom teacher was not entitled) and status (according to the complainant; district officials deny that there was a reduction in status), and occurred despite the fact that the complainant's supervisor had repeatedly submitted requests to various district officials for the complainant to be promoted to the position of assistant principal.

well as a retaliatory demotion. 6/ An additional on-site was conducted to focus on the retaliation aspect of the complaint. 7/

There were three other individuals who had participated in the administrative internship program; two of them, however, were not similarly situated to the complainant. Those two individuals had been temporarily appointed to the position for emergency reasons after the 1976-77 school year had already begun; neither had been led to believe, as had the complainant, that their appointments would have promotion potential; and both of these individuals, as expected, resumed their teaching positions in the 1977-78 school year.

The third administrative intern (a male) was more similarly situated to the complainant's circumstances. Although he, like complainant, was initially returned to the classroom for the 1977-78 school year, halfway through the year, he was appointed as "administrative assistant," a position which, although affording him no additional salary, allowed him to continue receiving administrative experience. The complainant was afforded no similar opportunity and was given no option upon the demise of the internship program other than returning to the classroom.

The complainant notified OCR of the ostensible reemergence of an administrative program (*i.e.*, the TOSA position) when she learned about it a year after the termination of the administrative intern program. She forwarded two letters to OCR, one dated August 25, 1978, and the other September 20, 1978, both of which essentially advised OCR of the existence of the TOSA program and of the fact that three males (none of whom appeared any more qualified than she) had been selected as TOSAs. These positions had been neither publicly advertised nor otherwise directed to the complainant's attention.

Our subsequent investigation pointed out a remarkable similarity between the defunct administrative intern program and the newly created TOSA program. Like the administrative interns, in the first year (SY 1978-79) the TOSAs

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6/ The demotion of Ms. Montgomery was one of the factors contributing to OCR's original determination of the district's ineligibility for ESAA funding for the 1978-79 school year, since OCR then believed that the demotion was a result of race (and sex) discrimination. Subsequent to the show cause hearing and during settlement negotiations, OCR's determination regarding Ms. Montgomery's demotion was withdrawn for ESAA purposes when the school district agreed to major procedural changes that would remedy the cited compliance violations (although they were not directly related to her demotion). OCR agreed not to pursue the charge of retaliation for having filed a race discrimination complaint.

7/ On July 31, 1980, OCR informed the district that while it no longer had jurisdiction over the sex discrimination complaint (because of the decision in *Romeo Community Schools v. HEW*), it did maintain jurisdiction over, and would continue to pursue, the retaliation aspect of the complaint. This decision has since been overruled. *See* discussion *infra* on the effect of the recent Superme Court decision in *North Haven*.

performed administrative duties 8/ and assisted their respective principals/supervisors, received extra pay (16 additional days), 9/ were under supplemental contracts, and did not perform any classroom teaching. This conclusion as to the striking similarity between the former administrative intern program and the TOSA position was borne out by the remarks of one of the four original administrative interns. 10/ When asked whether he knew of any "teachers on special assignment," he responded that he was aware of three TOSAs who were functioning as administrative interns. When given the TOSA job description and asked if its duties were similar to the duties performed by an administrative intern, he said, "There's no question about it. Those are the duties of an administrative intern." In response to a question as to why he thought the administrative intern position had been eliminated, he said ("off the record") that it hadn't been eliminated, but that the name had been changed to "teacher on special assignment." According to the EOS, he also said that the only reason they had made the effort to change the name of the program was because Mary Montgomery had filed a complaint alleging that the district had discriminated against her. 11/ (Unlike his other statements, however, the latter comment was neither recorded by the EOS nor signed by the former intern.)

8/ The district recently contended that TOSA was a "non-administrative" position. It refused to compare the two programs since none of the TOSAs had been promoted to the position of assistant principal, whereas six (out of the thirteen individuals participating in the program over the years) administrative interns had become assistant principals. The district's assertion does not prove, however, that the TOSAs are non-administrative *per se*, inasmuch as *no one* has been appointed to the position of assistant principal since 1976. Furthermore, in an informal sampling taken of district students, approximately five out of six students responded to the EOS's question as to who the school's assistant principal was by naming the TOSA assigned to that school.

9/ According to district officials, TOSAs no longer receive any extra days, *i.e.*, the salary and benefits are comparable as those of a teacher.

10/ This former intern is the person described above as most similarly situated to the complainant.

11/ Disclaiming this explanation, the district repeatedly pointed to the fact that all four of the 1976-77 interns were returned to the classroom at the end of that academic year because of budgetary limitations. Moreover, adhering to its contention that OCR lacks jurisdiction, the district had not, prior to a recent (March 23, 1982) on-site visit, responded to OCR's last written correspondence, dated May 18, 1981. That letter had attached a copy of the February 11, 1981 letter to the district, in which OCR explained that the *Romeo* case does not apply to retaliation cases, that OCRC did not consider all the evidence OCR considered, and that OCR is not legally bound by the decisions of the OCRC.

Although the district's reliance upon budgetary problems as causing the discontinuation of the administrative intern program at the end of the 1976-77 school year may have been valid, it would appear that the previous budgetary constraints had been rectified when the TOSA program was established for the 1978-79 school year. Given the similarity of the two programs, as attested to by a former participant, and the fact that Ms. Montgomery's administrative qualifications were not subject to question, it would stand to reason that she not only should have been informed of the re-creation of the program so that she could have applied for a position, but also that she should have been considered for a position. Her qualifications were comparable to, and in some cases exceeded, those of the men selected for the positions. 12/ At the March 23, 1982 meeting with district officials, when asked why the district had failed to promote, or even consider, Ms. Montgomery for a TOSA position, the repeated response was that she was not at one of the schools where a principal has asked for a TOSA. Apparently, a TOSA is only appointed by the principal at the school where the individual is already assigned (*i.e.*, no staff increases are involved), and TOSAs had only been used, until SY 1981-82, at secondary schools paired for desegregation purposes. This ignores the fact, however, that the district could have transferred Ms. Montgomery to a different school, *i.e.*, one which was to be paired for desegregation purposes, so that she could have been

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12/ The following summarizes the experiences of the three men who became TOSAs in SY 78-79:

Ronald McCreight:
- o 21 years with the district (8 years as a Music teacher, 13 years as an English teacher)
- o SY 76-77, appointed administrative intern (took over for another when an emergency arose)
- o knew it was a temporary assignment and had no expectations for a better position
- o received administrative certification
- o SY 77-78, resumed assignment as English teacher
- o SY 78-79, appointed TOSA

Walter Ingram:
- o 9 years with the district (high school English teacher; department head for four of those years)
- o received administrative certification
- o Master's degree in Administration
- o SY 78-79, appointed TOSA

William Kash:
- o with the district since 1958 (8th grade English teacher for 7 years; elementary principal for 3-4 years; thereafter, taught high school; went to night school; took 1 year leave of absence)
- o Ph.D. in Educational Administration

The following represent the complainant's experience:
- o 11 years with the district (high school Math teacher)
- o 3/74 thru end of SY 76-77, appointed administrative intern
- o received administrative certification
- o Master's Degree

selected for the TOSA experience. Even if she had not been transferred to such a school originally (i.e., as of the beginning of SY 1977-78), the district could have subsequently assigned her to such a school to teach, and thus enable her to be a TOSA appointee. This was indeed what was done for one of the original TOSA appointees (who was also one of the two "emergency" replacements for the administrative intern program during SY 1976-77). This individual was assigned to the school for SY 1978-79 to teach, and shortly thereafter, selected as a TOSA. It would thus appear that the district's reasoning fails to rebut the conclusion that its justification for not promoting Ms. Montgomery is anything more than a pretext.

Once the race and sex discrimination charges had been dismissed 13/ and with only the Title IX retaliation issue remaining, the district was given the opportunity to remedy the violation through 1) promotion of the complainant to the administrative intern, or a comparable (e.g. TOSA), position, and 2) retroactive pay to the complainant in the amount of the difference between her salary as a classroom teacher and the salary she would have received as a TOSA or the comparable position. 14/ Further, Ms. Montgomery should be given assurances, which should be adequately documented in her employment record, that 1) she would have been promoted previously, but for the retaliation, and 2) she will not be penalized in the future for having filed either the initial or the present complaint. The district has refused to even consider instituting these remedies, however, relying, in part, upon the Romeo decision (reversed by implication by the Supreme Court decision in North Haven), 15/ the decision of the State agency which dismissed the retaliation complaint, and their categorical denial of any wrongdoing.

13/ To the extent that the Region has been advised to contact all complainants with unresolved Subpart E claims, and further, to the extent that we have been in contact with Ms. Montgomery as recently as March of this year, at which time she unequivocally indicated her continued interest in having all of the allegations pursued, it is a reasonable assumption that the substantive sex discrimination charge will be resurrected. When and if this occurs, it would be advisable to join such an action with the instant issue, assuming that enforcement proceedings are already under way at that time.

14/ According to district records, apparently the TOSAs received the extra pay (i.e., three weeks more than a teacher receives) only for the first year of the program (SY 1978-79).

15/ On June 8, 1982, the Litigation Division attorney assigned to the case telephoned the district's attorney in order to ensure that the district was aware of the North Haven decision and to see what effect, if any, the decision would have on the district's previous position with respect to the charges filed by Ms. Montgomery. The district's attorney indicated that she believes that the decision in North Haven only bolsters the district's position. Although the attorney admitted to having not yet read Romeo, she would not

(Footnote 15 continued on next page)

As recently as March 23, 1982, a Litigation Division attorney and the EOS from the regional office who had participated in the original on-site traveled to Dayton to determine the district's present position regarding its treatment of Mary Montgomery and to see whether voluntary compliance were possible, particularly in view of the fact that the district had recently hired a new superintendent. It became obvious after only a few minutes with two district officials and the district's attorney that voluntary negotiations were out of the question.

ACTIONS: LEGAL ANALYSIS AND DECISION

In addition to establishing the basic elements of a *prima facie* case of retaliation, a separate inquiry must be made 16/ as to whether the final decision by the State commission (OCRC) dismissing the retaliation complaint 17/ precludes OCR from proceeding to enforcement with the instant complaint to the extent that we could be barred by the doctrines of *res judicata* and collateral estoppel. As

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(Footnote 15 continued)

directly respond to the inquiry as to how *North Haven* impacts upon the previous position except to say that she believes that there are significant time problems (*i.e.*, laches) with the Department's case against the district and that, overall, the district's position has not been changed by the *North Haven* decision. In our view, laches would not succeed as an affirmative defense to this action. The district would have difficulty proving that it was prejudiced by the passage of time. We did not, for example, receive any response from the district after our last correspondence, dated May 18, 1981, at least not until the Litigation Division attorney spoke to the district's attorney about scheduling a meeting in Dayton to determine the district's current position. Nevertheless, it would be prudent to expedite the administrative proceedings in this case to avoid further delay.

16/ Inasmuch as the *Romeo* decision is no longer an obstacle to examining the Subpart E Title IX employment discrimination claim, in light of the Supreme Court's recent holding in *North Haven*, it is no longer necessary to discuss whether that decision would similarly curtail our jurisdiction to handle complaints of retaliation emanating from the filing of Title IX employment complaints, as had been an issue in the original enforcement recommendation (Tab A).

17/ It should be noted that the OCRC viewed the district's action as a retaliatory demotion, rather than as a failure to promote, the latter being the way we view this case. In anticipation of the district's assertion that OCR is estopped from pursuing this action on either the theory of *res judicata* or collateral estoppel, this difference may be noteworthy. In order for either theory to effectively serve as an affirmative defense, the parties and issues of the comparable cases must be identical; thus, if the issue in the OCRC hearing was limited to a retaliatory demotion (under Title VII) and the focus of the OCR inquiry is a retaliatory failure to promote (under Title IX), then it could be argued that the issues are not the same and neither *res judicata* nor collateral estoppel would be a bar to the OCR action. However, we do not think that this distinction in characterization would be legally operative.

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will be discussed below, this potential obstacle should not enjoin our administrative enforcement efforts; failure to take this violation to enforcement would, however, create a chilling effect on Title IX's efficacy as a remedial tool.

The establishment of a *prima facie* case of retaliation requires a showing that 1) the employee engaged in protected activity, 2) the employer was aware of the protected activity, 3) there were different conditions of employment before and after the protected activity, and 4) the negative conditions followed the protected activity within such a period of time as to give rise to an inference of retaliatory motivations. *Kralowec* v. *Prince George's County*, 503 F. Supp. 985 (D. Md. 1980); *Hochstadt* v. *Worcester Foundation for Experimental Biology, Inc.*, 425 F. Supp. 318 (D. Mass. 1976), *aff'd*, 546 F.2d 222 (1st Cir. 1976); *In the Matter of Camden County Schools and Georgia Dept. of Education*, Administrative Proceeding, U.S. Department of Education, Docket No. 80-VI-3, 80-IX-3 (September 4, 1981). Once a *prima facie* case has been demonstrated, the burden shifts, and the party having taken the adverse action must show a legitimate, nondiscriminatory reason for such action. If such a reason is shown, the moving party has an opportunity to demonstrate that the stated reasons are merely pretextual. *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. ___, 101 S.Ct. 1089 (1981); *Camden County Schools*, *supra*.

Under 34 C.F.R. § 106.71 18/ of Title IX's implementing regulation (which adopts and incorporates by reference the Title VI prohibition against retaliation, at 34 C.F.R. § 100.7(e) 19/), any person who "has made a complaint . . . under this part" is protected against retaliation for such activity. Therefore, when Ms. Montgomery filed a Title IX complaint with OCR on December 28, 1976, she was engaging in a protected activity. 20/

18/ Section 106.71 states:

> The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 C.F.R. 100.6 - 100.11 and 34 C.F.R. Part 101.

19/ Section 100.7(e) (*Intimidatory or retaliatory acts prohibited*) states in pertinent part:

> No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by . . . the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part . . . .

20/ Prior to the recent Supreme Court decision in *North Haven*, the district disputed this proposition. They rejected the assertion that the complainant was engaging in a protected activity under Title IX since OCR then lacked substantive jurisdiction over the initial Subpart E complaint. *But see* footnote 15, *supra*.

The importance of the retaliation regulation is that it protects access to the processes available under Title IX. Inasmuch as it is intended to be more of a procedural safeguard than a remedy for the complained-of substantive violation, a complainant who files a Title IX complaint, under circumstances similar to those of Ms. Montgomery's, is protected against retaliation for filing that complaint. A school district should not be permitted to retaliate against a person because he or she filed a complaint with OCR about a practice prohibited by one of our regulations.

Although the Department's prohibition against retaliation has not been subjected to judicial analysis, courts have ruled on analogous prohibitions under Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a). Section 100.7(e) (and Section 106.71, through incorporation by reference) protects against two types of retaliation, retaliation for "opposition" and "participation." Like those provisions, Title VII provides for broad protection against retaliation and contains analogous clauses describing the protected classes. It is the so-called "participation clause" (which protects those who, *inter alia*, file a charge under the statute) which our attention is focused on for purposes of demonstrating that this complainant's activity was protected. The similarity of the language in Section 100.7(e) and Section 704(a) of Title VII, and the shared purposes of the two civil rights provisions, make judicial construction of the one applicable to the other. In *Sias* v. *City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978), the purpose of the participation clause was articulated, *i.e.*, it is "to protect the employee who utilizes the tools provided by Congress to protect his rights. If the availability of that protection were to turn on whether the employee's charge were ultimately found to be meritorious [or, by analogy, within the scope of the statute's jurisdiction], resort to the remedies provided by the Act would be severely chilled." Moreover, even if our retaliation jurisdiction were conditioned on the initial complaint's having been made in good faith, Section 100.7(e) would clearly protect Ms. Montgomery, since she filed the complaint with OCR with a reasonable belief that the facts were as she stated them and that OCR regulations prohibited the conduct of which she complained.

The complainant filed her complaint on December 28, 1976. On January 12, 1977, the district was notified that a complaint had been filed alleging race and sex discrimination against one of its employees for failure to promote, although Ms. Montgomery's name was not specifically mentioned. A letter from the school district, dated March 3, 1977, indicates that at least as early as February 28, 1977, the district was aware that Ms. Montgomery was the complainant. After the on-site investigation was conducted (March 10-11, 1977) and when the district notified the complainant that she was being returned to the classroom (in June of 1977), the district was certainly aware of the complainant's protected activity, *i.e.*, her filing a complaint with OCR.

Notwithstanding the initial characterization by OCR of the instant retaliatory action as a demotion, which resulted when the district transferred Ms. Montgomery from the position of administrative intern to classroom teacher, when the comparable position was established or reinstated, the district failed to promote the complainant to such a position. Whereas the district denies that such a transfer either is now or would then have been a "promotion" or a greater status position, all indications do point to the fact that had Ms. Montgomery been appointed a TOSA, she would have been afforded both the greater administrative experience and the concomitant status.

The measurement of whether a position carries increased status is not solely whether there is an increase in salary; additional responsibilities and experience may also figure into the determination. Just as a change in position may be characterized as a demotion if the individual, among other things, receives less pay *or* is given less responsibility, 21/ so, too, could the opportunity to move to a position with increased responsibilities, although not necessarily with an increase in salary, be characterized as a promotion. Inasmuch as the opportunity to move to a position with increased responsibilities was available, and further, inasmuch as Ms. Montgomery was qualified for such a promotion, the district's action constitutes a failure to promote the complainant.

The requisite causal connection can be shown by comparing the treatment of the complainant prior to the filing of the complaint with the adverse treatment received subsequent to its filing, or it can even be inferred from the sequence of events. *Francis* v. *American Telephone and Telegraph Co.*, 55 F.R.D. 202 (D.C. 1972); *Kralowec*, *supra* at 1010; *Hochstadt*, *supra* at 325. The failure to promote the complainant occurred after the district had first learned of her complaint and after at least one of the on-site investigations had been conducted. This adverse action therefore followed her protected activity, and the district's awareness of this activity, and, considering the sequence of events which ensued, occurred within a close enough period of time that a court could reasonably infer retaliatory motivation.

Having thus established the necessary elements to submit a *prima facie* case of retaliation, the next step is to consider any legitimate, nondiscriminatory reasons offered by the district for its adverse action against the complainant. The district's position is that it returned Ms. Montgomery to the classroom not as a retaliatory act, but for financial reasons, and that it has not failed to promote her since 1) it does not deem a TOSA position as a promotion, 2) even if it were a promotion, the complainant was essentially ineligible for a TOSA position since she was not at a school where a TOSA was needed, and 3) no other promotionary position has become available since the termination of the administrative intern program.

The remaining issue concerns the impact of and deference to be given to the decision of the Ohio Civil Rights Commission. The complainant filed a charge with the OCRC on June 28, 1977. After an investigation was conducted and probable cause was found, OCRC issued a formal complaint on July 10, 1979, alleging that the demotion was in retaliation for the complainant's filing a discriminatory complaint with the EEOC in 1976. The Hearing Examiner subsequently recommended that OCRC dismiss the case both on jurisdictional

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21/ *See Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211, 1216 (5th Cir. 1970).

and substantive grounds. 22/ The OCRC dismissed the case on October 6, 1980.

The OCRC did not, however, fully explore the evidence to the same extent that OCR did. Because of its more limited investigation, OCRC was unable to demonstrate that the "teacher on special assignment" program was essentially a substitute for the administrative intern program. Their investigation did not continue into the 1978-79 school year, as did OCR's, and therefore, could not reach the same conclusion, *i.e.*, that the 1978-79 TOSA positions were comparable to the 1976-77 administrative intern positions, despite the different job titles, and that the reemergence of the position, for which Ms. Montgomery was duly qualified, strongly suggested that the district promote her accordingly.

In order to justify the application of either collateral estoppel or *res judicata*, both "the judicially determined matter and the proceeding under consideration [must] have a strict mutuality of parties and of issues." *Perry County*, *supra*, at 7. The parties to the OCRC proceeding were the complainant and the school district; the moving party in the immediate proceeding is the Assistant Secretary for Civil Rights, not a party to the OCRC proceeding. Furthermore, the issues in the two proceedings differ; the OCRC action involved an allegation of retaliation for having filed a Title VII complaint, whereas the instant action involves Title IX, and the remedy sought would be the denial of Federal funds to a recipient who has restricted access to OCR's administrative processes. Moreover, collateral estoppel and *res judicata* "are not to be rigidly applied." *Perry County*, *supra*, at 7. *See also Shimman* v. *Frank*, 625 F.2d 80, 89 (6th Cir. 1980). If the result of applying either doctrine would be to contravene overriding public policy or result in manifest injustice, then courts have held that these doctrines should not apply. *Tipler* v. *E.I. Dupont Nemours and Co.*, 443 F.2d 125, 128-9 (6th Cir. 1971); *Perry County*, *supra*. "[T]he implications of barring a civil rights claim on *res judicata* grounds deserve

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22/ The recommendation to dismiss the complaint on procedural grounds was based on a State statute of limitations. The OCRC was required to issue a formal complaint within two years after the alleged unlawful discriminatory practices were committed. The complainant argued that the retaliatory demotion took place on September 6, 1977 (the date she actually returned to the classroom), whereas the district argued -- successfully -- that it occurred, if at all, on June 29, 1977, when she received written notice of the reassignment. The Hearing Examiner, having determined that the statute of limitations expired as of June 28, 1979, granted the district's Motion to Dismiss. He also decided the case on the merits and found that the district's reliance upon budgetary concerns was valid, and that it was enough that the district could demonstrate that all four of the 1976-77 administrative interns were returned to classroom teaching assignments at the end of the year. Based on this evidence (which was not as complete as that produced by OCR's more exhaustive investigation), the Hearing Examiner concluded that there were legitimate, nondiscriminatory reasons for the demotion which were not merely pretextual.

careful consideration. [Citations omitted.] . . . [I]t would be impossible for the statute to be implemented if persons were subject to threats, coercion or retaliation. For that reason alone it [may not be] in the public interest to apply the doctrines of collateral estoppel or *res judicata* even if they technically were applicable." *Perry County*, *supra*, at 8. Thus, not only because the parties and issues in the two proceedings are at variance, [23] but also because it would contravene public policy to eliminate the protection against threats, coercion or retaliation afforded an individual filing a Title IX complaint, it would be, therefore, inappropriate to apply either *res judicata* or collateral estoppel to bar the enforcement of this action.

Having established not only a *prima facie* case of retaliation, but also that the district's proffered "legitimate, nondiscriminatory reasons" are no more than pretexts, we conclude that the district is in violation of Title IX and the implementing regulation. The fact that a decision has been rendered by a State agency does not, in and of itself, dispose of the matter. Not only are the two proceedings not identical, but also it would not be in the public interest for us to close our file in this matter. The case involves more than just a retaliatory demotion of an individual; it also involves ensuring accessibility to OCR's administrative processes. "[U]nremedied retaliation has a long-term chilling effect upon the willingness of the persons against whom the retaliation was directed and others to utilize their rights under the [Act]." Brief on Behalf of the Assistant Secretary for Civil Rights, *In the Matter of Camden County Schools, Georgia*, *supra*, at 31.

APPROVED ____________________

DISAPPROVED ____________________

OTHER/COMMENTS I just don't see the retaliation from the facts stated here.

DATE 7/12/82

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[23] *See* pending LEPS/Litigation Division memorandum entitled, "OCR's Authority to Defer Compliance or Enforcement Obligations to Pending Federal or State Court Litigation and to Other Federal and State Agencies," for its discussion of the binding effect, if any, of a State court or agency decision on OCR.

ATTACHMENTS

Tab A: Original Recommendation for Title IX Enforcement Action Against Dayton Public Schools, Dayton, Ohio, OCR No. 15760070, dated January 11, 1982

Tab B: Comments from Michael A. Middleton, dated January 20, 1982

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

DATE: SEP 3 1985

TO : **Linda A. McGovern**
Acting Regional Civil Rights Director
Region V

FROM : Harry M. Singleton
Assistant Secretary
for Civil Rights

SUBJECT: Title IX Complaint Against Dayton Public Schools, Dayton, Ohio, Complaint No. 15-76-0070

In January 1982 your office recommended enforcement against the Dayton Public Schools on the grounds of discrimination under Title IX against a female teacher, Ms. Mary Montgomery. The complainant originally complained that the school district had discriminated against her on the grounds of race and sex by failing to promote her from the position of administrative intern to the position of assistant principal. In addition, the complainant alleged that the school district retaliated against her for having filed a complaint with OCR, by demoting her from the position of administrative intern to the position of classroom teacher. Headquarters OCR referred this case to the Department of Justice (DOJ), which declined to initiate judicial enforcement and returned the case to us in August 1983.

I wish to determine whether administrative enforcement may be appropriate in this case, notwithstanding DOJ's refusal to bring judicial action. Please update the factual information on the complaint. The update should include, in order to establish jurisdiction, a description of the Federal financial assistance received by the district, and an analysis of its connection to the facts of the complaint. In addition, we would need to know (1) whether the complainant is still interested in seeking relief on the grounds alleged in her complaint and would be available to support an administrative proceeding as a witness, and (2) whether (without undertaking a new investigation) your office has any evidence that a pattern and practice of sex discrimination in the consideration of females for administrative positions exists in the school district. If the complainant is still interested in pursuing the matter, we would need to know the facts concerning her employment history since she was last contacted by your office.

If you have any questions concerning this matter please contact me or have a member of your staff contact Alan Jacobson, FTS 732-1702.

U.S. Department of Justice

Mr Singleton
Rec'd 8/12/83

JWN:md
169-58-

Washington, D.C. 20530

AUG

Harry M. Singleton
Assistant Secretary for Civil Rights
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D. C. 20202

Re: *Mary Montgomery v. Dayton Public Schools, Dayton, Ohio, Office for Civil Rights Case No. 15-76-0070*

Dear Mr. Singleton:

We have received your letter of July 23, 1983, referring this matter to the Department of Justice for possible enforcement action against the Dayton Public Schools (Dayton) under Title IX of the Education Amendments of 1972. After reviewing the Office for Civil Rights case file, we have decided not to take enforcement action against Dayton.

Our decision not to pursue this matter is based primarily on two considerations. First, it appears that the complainant, Mary Montgomery, is the only person who may have been subject to the Title IX violations found by OCR. There is no evidence to suggest that Dayton is engaged in a continuing pattern of discrimination.

Second, Ms. Montgomery's OCR complaint is substantially similar to the complaint she filed in federal court under Title VII of the Civil Rights Act of 1964, as amended. That complaint was dismissed with prejudice for failure to prosecute. The decision in Ms. Montgomery's private litigation renders this matter a less than ideal vehicle for Title IX enforcement action by the United States, especially since such action would likely be based only on practices that were or could have been the subject of Ms. Montgomery's individual Title VII charge. *See*, *Equal Employment Opportunity Commission v. Huttig, Sash & Door Co.*, 511 F.2d 453 (5th Cir. 1975).

Accordingly, we believe that further activity by the Department of Justice in this matter is not warranted. Should you have any questions about our decision, please do not hesitate to call me at 633-3831.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

By:

David L. Rose
Chief
Federal Enforcement Section

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

DATE SEP 30 1985

TO Madeleine Will
Assistant Secretary for
Special Education and
Rehabilitative Services

FROM Harry M. Singleton
Assistant Secretary
for Civil Rights

SUBJECT: Request from the Intergovernmental Relations and Human Resource Subcommittee

On September 11, 1985, I appeared before the Intergovernmental Relations and Human Resource Subcommittee of the Committee on Government Operations, U.S. House of Representatives, which had been convened for the purpose of conducting oversight of the Office for Civil Rights (OCR) operations. The Chairman of that Subcommittee, Ted Weiss, requested that I obtain for the Subcommittee information as to the status of a case involving the Illinois State Board of Education regarding its failure to ensure that institutionalized handicapped children are provided an appropriate education, which case was referred to the Department of Justice (DOJ) on June 23, 1983 by OCR and subsequently referred to the Office for Special Education and Rehabilitative Services by DOJ on January 25, 1984.

A copy of the relevant pages from the hearing transcript concerning this request is attached for your information.

Accordingly, I would appreciate you providing me with the information requested so that I may, in turn, provide it to the Subcommittee. If you have any questions, please contact me or your staff may contact my attorney advisor, Stephanie A. White at 732-1213.

Attachment:
as stated

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE ASSISTANT SECRETARY
FOR SPECIAL EDUCATION AND REHABILITATIVE SERVICES

Mr Singleton
cy PES
AN/NA [illegible] 10/16

OCT 1 1 1985

cy file
Chicago

MEMORANDUM

TO : Harry Singleton
Assistant Secretary

FROM : Assistant Secretary
Office of Special Education
and Rehabilitative Services

SUBJECT : Request from the Intergovernmental Relations and
Human Resources Subcommittee

As you are aware, on April 23 - 24, 1985, members of your Region V staff and my staff participated in a joint visit to mental health facilities in Illinois to determine whether children placed in those facilities were receiving a free appropriate public education (FAPE) in the least restrictive environment (LRE). The findings of this visit were shared with you and your staff and subsequently communicated to Illinois as a final letter of determination on May 23, 1984 (copy attached).

Note that OSERS believes the findings cited in this letter confirmed EHA-B violations in the areas of FAPE and LRE and are more recent than those cited in the June, 1983 case referred to the Department of Justice.

Subsequent to the May 23 letter, OSERS, working closely with your staff, has been able to substantially resolve the non-compliance issues, and obtain Illinois' commitment to corrective action. We will continue to monitor the commitment of Illinois to the corrective action stated.

Madeleine Will
Madeleine Will

Attachment

400 MARYLAND AVE., S.W. WASHINGTON, D.C. 20202

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE ASSISTANT SECRETARY
FOR SPECIAL EDUCATION AND REHABILITATIVE SERVICES

MAY 23 1985

Mr. Joseph E. Fisher
Assistant Superintendent
Department of Specialized
Educational Services
Illinois State Board of Education
100 North First Street
Springfield, Illinois 62777

Dear Mr. Fisher:

I want to express my thanks to you and your staff for the cooperation and assistance given to the site visit teams which visited Illinois on April 23-24. The purpose of this letter is to indicate to you our findings and conclusions from that visit.

Background

On April 23-24, a site visit was conducted by officials of the Department of Education to review special education programs at the Fox and Murray Developmental Centers. These programs are operated by the Livingston County Educational Service Region and Kaskaskia Special Education District respectively.

In addition, Department officials met separately with Illinois State Board of Education (ISBE) representatives on April 23 to discuss general supervision and due process issues.

The purpose of the April 23-24 review was to make a final determination of ISBE's compliance with regulatory requirements set forth at 34 CFR 300.600. These requirements relate to ISBE's general supervisory responsibility for educational programs operated by local educational agencies and other State agencies and specifically, in the case of this review, to education programs serving residents of Illinois Department of Mental Health and Developmental Disabilities (DMH/DD) facilities.

The review was also to determine the status of ISBE's assurance that Illinois maintains a system for the impartial review of hearing officer decision pursuant to 34 CFR 300.510.

Findings

ISBE is responsible for assuring that each educational program for handicapped children administered within the State, including each program administered by other public agencies, meets the requirements in 34 CFR Part 300 (see 34 CFR 300.600).

400 MARYLAND AVE., S.W. WASHINGTON, D.C. 20202

Based on evidence collected prior to and during the April 23-24 review, the Department concludes that ISBE is not adequately assuring that the requirements of 34 CFR Part 300 are being met in educational programs administered by local education agencies and other public agencies.

The following citations are noted to support the Department's findings:

a. Failure of ISBE to require DMH/DD to provide an impartial hearing to review a dispute regarding the educational placement of William C. Claiborne (34 CFR 300.600, 300.506). The parents of William were denied access to a due process hearing by DMH/DD. The 1985 grant award letter to Illinois also stated that Illinois must demonsrate that the EHA-B due process system is available to parents when ISBE rejects an LEA request for a private residential placement.

b. Failure of ISBE to provide an appropriate public education at no cost to the parents in the case of William Perkins, Jr., who was adjudicated delinquent and placed at Eau Claire Academy under juvenile court wardship and order (34 CFR 300.300). ISBE has allowed the costs of the special education services provided to William at Eau Claire to be charged to his parents.

c. Failure of ISBE to assure that DMH/DD residents have a continuum of alternative placements available (34 CFR 300.551) and to assure, to the maximum extent appropriate, that handicapped children are educated with children who are not handicapped (34 CFR 300.500, 300.554).

Substantial progress is being made with respect to ISBE's stated goal of transferring educational programs for DMH/DD residents to the control of local school districts and with respect to providing FAPE to DMH/DD residents. The directors of the programs at Fox and Murray are to be especially commended for the progress that has been made. However, evidence collected during a review of educational files and interviews with staff from the two programs reveal serious violations of the cited requirements in 34 CFR 300.550 and 300.554. A summary of these findings is as follows:

- All residents of the Murray Developmental Center are being educated in a segregated facility on the grounds of the Center.

- The educational files of Murray residents did not, for the most part, contain evidence that placements in a restrictive environment were considered and justified in the IEP development.

- In two instances involving Murray residents (Theodore Collins, Kathy Howder) where LRE was considered in IEP development, placement in LRE settings in the public schools was recommended. In one instance the placement was not provided and in the other instance the public school placement was terminated prematurely over the objections of Murray educational staff.

- During interviews with Murray staff, it was indicated that placements in the regular schools near Murray were not available due to a perceived resistance from local school officials to the placement of Murray residents, although two schools near Murray serve handicapped students who have handicapping conditions similar to Murray residents.

- During interviews with Fox staff, it was indicated that, although a number of Fox students had received placements in the local school, these placements were contingent on the availability of space in the local school instead of being contingent on the individual educational needs of the child.

Corrective Action

The Department, in order to assure correction of the deficiencies noted in the "findings" section of this letter, requires ISBE to undertake the following corrective actions within the specified timelines:

a. ISBE must immediately provide William G. Claiborne with an offer of an appropriate alternative to his current placement at the Brown School or confirm his current placement at the Brown School for the next school year. This action should be completed within 30 days of receipt of this letter. This Department should be notified of the results.

b. ISBE must immediately assure that the parents of William Perkins, Jr., will not be charged for the placement of William at Eau Claire from September 1983 to November 1984 when William was released. A statement of this assurance should be issued within 30 days of receipt of this letter and a copy forwarded to the Department.

c. All residents in the educational program at the Murray Developmental Center and other DMH/DD facilities must receive an evaluation before the 1985-86 school year to determine if placement in a restrictive environment is justified. Results of these evaluations should be summarized and submitted to the Department by October 1, 1985 and include at a minimum how many children were recommended for placement in a less restrictive environment and how many were actually placed for each facility.

d. ISBE must disseminate LRE guidelines to all DMH/DD programs and all LEA programs providing educational services to DMH/DD residents within 90 days of receipt of this letter. In addition, by the same date, Directors of individual school districts within the service areas of DMH/DD programs must also be notified of rules regarding the availability of placement continuums for DMH/DD residents. A copy of the guidelines and notice should be sent to the Department.

e. ISBE must develop and disseminate procedures to resolve disputes over placement recommendations where schools within an LEA disagree as to the appropriate school placement. A copy of the procedures that are disseminated should be sent to the Department within 90 days of receipt of this letter.

f. ISBE must develop and begin implementing within 90 days of receipt of this letter an in-service training program for appropriate staff employed in educational programs for DMH/DD residents. One focus of the training should be the LRE requirements. A schedule and outline of the training program should be sent to the Department.

g. ISBE must submit to the Department within 60 days of receipt of this letter a final schedule for transfer to LEA authority all remaining educational programs operated by DMH/DD.

h. ISBE must within 30 days of receipt of this letter advise the Department as to what policy, regulation or other evidence exists (or which shall be established), which clearly establishes ISBE's general supervisory authority over education programs operated by other state agencies and what mechanism is available (or shall be established) for enforcing that authority.

i. ISBE must conduct training sessions for appropriate staff operating educational programs in other state agencies with respect to P.L. 94-142 requirements. This training must be completed within 180 days of receipt of this letter. A schedule and outline of the training program should be sent to the Department by July 1, 1986.

Policy Issue

The Department has not received satisfactory evidence that ISBE maintains an impartial system for review of hearing officer decisions. It is our understanding that ISBE plans to press the State legislature for adoption of a bill that will remedy the findings in this issue. Since the Illinois legislature must act on this legislation by June 30, 1985, the Department views this date as the final one for resolving this issue. If no action is taken by that date to bring the system for reviewing hearing officer decisions into compliance with impartiality requirements, the Department will disapprove the Illinois state plan for the FY 1985-86 school year.

Response Deadline

Within 10 days subsequent to receipt of this letter, ISBE must indicate in writing to the Department that it either accepts or rejects the findings and remedies set forth in this letter. If accepted the Department anticipates satisfactory settlement of the remaining compliance issues which we have with ISBE.

Sincerely,

Patricia J. Guard
Acting Director, Special
Education Programs

TAB E

The Office for Civil Rights initiated administrative enforcement action against the Petaluma City Elementary School District and the Petaluma Joint Union High School District (the Petaluma School District) in March 1984. The findings underlying that administrative enforcement action were that: (1) the Petaluma School District had maintained policies and practices which had the effect of discriminating against qualified female applicants for appointment to certificated administrative positions; (2) the Petaluma School District had formerly practiced a policy in hiring secondary school teachers of "linking" academic assignments with coaching responsibilities and that this policy had a discriminatory impact on female applicants for teaching positions, and (3) that the Petaluma School District had in one instance reassigned a female and in another denied a vacancy to a female because of sex in violation of the law.

In furtherance of its efforts to settle the OCR-initiated action, the District proffered a commitment to ensure that women are included in the interview process. In a memorandum dated May 31, 1985, and enclosed herewith, I detailed reasons why that particular provision was objectionable. The portion of that memorandum that bears repeating here is as follows:

> "Although I am informed that these provisions were proposed by the school district, they would be enforced by OCR. Briefly, I find these provisions to be overly complicated, and they give the appearance of an unnecessary intrusion by OCR into the administration of the school district. Furthermore, it should be possible to achieve the same objective of achieving more equitable treatment for female applicants, without such a rigid formula."

The basis of my decision in this regard was to secure a remedy that would fully ly correct the violation without infringing on the administrative perogatives of those charged with running the affairs of the school district. Often, in investigating and resolving civil rights complaints against educational entities, OCR must strike a proper balance between two competing interests -- the academic discretion of the recipient and the interest of the Federal government in ensuring nondiscrimination in the recipient's Federally funded programs -- both of which have constitutional dimensions. While this task is not an easy one, what is clear from the case law applicable to this area is that the interests of the government must be strong and the extent of intrusions carefully limited if the government's interest is to prevail.

Nothwithstanding the fact the commitment in question was not solicited by OCR, OCR must be ever mindful of the limits of its authority in accepting settlements. The line between what OCR requires by way of an agreement and what is proffered at the option of the recipient is obscured by the fact that the document must be enforced by OCR. In this regard, it is noteworthy that in the past recipients have proffered commitments only later to object to them as representing an excessive intrusion.

TAB F

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

DATE JAN 7 1985

TO : Taylor D. August
Regional Civil Rights Director
Region VI

FROM : Harry M. Singleton
Assistant Secretary
for Civil Rights

SUBJECT: Royal Independent School District, Nos. 06-84-1152 and 06-84-1014

In connection with the Enforcement Activity Report, No. 06-83-1012, previously forwarded to headquarters, I had concluded that based upon the facts then submitted, Royal Independent School District (Royal ISD) was a recipient of Federal funds. You have now submitted various correspondence and proposed closure letters in two new complaints involving Royal ISD (Nos. 06-84-1014 and 06-84-1152) in which you have concluded that Royal ISD is not a recipient of Federal funds, either directly or indirectly. Your conclusion that Royal ISD is not a recipient of Federal funds is based upon new facts which have become available subsequent to my August 17, 1984 memorandum.

Accordingly, I am considering these documents to be informational and am returning them to you for processing consistent with the Investigation Procedures Manual, Sections I-2.1 and I-2.22.

If you have any questions, you may contact me or your staff may contact Stephanie A. White, my attorney advisor, at FTS-732-1474.

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION
REGIONAL OFFICE
1200 MAIN TOWER BUILDING
DALLAS, TEXAS 75202

DATE: December 21, 1984

TO : Harry M. Singleton
Assistant Secretary for
Civil Rights

FROM : Taylor D. August, Director
Region VI, OCR

SUBJECT: Royal Independent School District (ISD), OCR Nos. 06841152, 06851014

By this memorandum, we are forwarding for your review and approval for release, an administrative closure letter in the above-referenced cases. The allegations in the cases are the failure of the Royal ISD to ensure that handicapped students, residing in the school district, receive an appropriate education, and the taking of retaliatory actions against one of the complainants in response to her filing a complaint with the Office for Civil Rights (OCR). To briefly summarize, the Regional Office has determined that the Royal ISD does not receive Department of Education funds, nor services or benefits derived through such funds. The facts which were dispositive in making this determination are detailed below.

During and prior to the 1983-84 school year, the Royal ISD was a member of a three school district special education cooperative, the Waller County Special Services Cooperative (WCSSC). The district was not a direct recipient of Department of Education funds; however, the WCSSC received, funds under P.L. 94-142 and Title I of the Elementary and Secondary Education Act of 1965, as amended by P.L. 95-561. The amount of funding received by the WCSSC was based on a headcount of the handicapped students to be served in the three member school districts, thus, including the Royal ISD. Further, during this same period, the Royal ISD received services and benefits which were in part or fully financed with Department of Education funds administered through a regional education service center. Such services as in-service teacher training, student physical therapy evaluations and therapy were provided by this federal funds recipient.

Effective August 1, 1984, however, the Interim Commissioner of Education of the Texas Education Agency (TEA) in response to a request by the Royal ISD, approved the release of the district from participation in the WCSSC. In so doing, the Interim Commissioner required that the Royal ISD ensure the provision of a free appropriate special education to eligible handicapped students in its district, primarily to be financed through the use of local school district funds, instead of federal or supplemental state funds. The district continues to receive the basic allocation of state funds under the Texas Foundation School Fund Program, as do all other local education agencies in the state; however, no Department of Education funds are provided either directly or indirectly to the district. Additionally, effective in the same school year, i.e., July 1, 1984, the Royal ISD ceased to receive services provided by the regional education service center, or any benefits derived from Education funds disbursed through this recipient. These actions were confirmed by the TEA Interim Commissioner of Education during an October 17, 1984, on-site meeting, and by the Executive Director of the Region IV Education Service Center in communications dated November 20, 1984, and December 7, 1984. (See attached letters from TEA, the Region IV Education Service Center, and OCR.)

Based on the reasons set forth above, we have determined that the Royal ISD is not a recipient of Department of Education funds either directly or indirectly; therefore, OCR is without jurisdiction to investigate the complaints. We request your review of and concurrence in this determination, and approval for release of the enclosed letter. Should you have any questions regarding the content of this memorandum or administrative closure letter, please contact me, or a member of your staff may contact Joan Sessoms Ford, or Evelyn Hicks at FTS 729-3017.

Texas Education Agency

201 East Eleventh Street
Austin, Texas
78701

- STATE BOARD OF EDUCATION
- STATE COMMISSIONER OF EDUCATION
- STATE DEPARTMENT OF EDUCATION

August 29, 1983

Dr. John A. Bell, Director
Elementary and Secondary Division
Office for Civil Rights
U. S. Department of Education
1200 Main Tower Building
Dallas, Texas 75202

Dear Dr. Bell:

This will confirm our telephone conversation of this date relative to the status of federal funding for Royal Independent School District. For the years 1982-83 and 1983-84, no federal funds have been awarded by this Agency to the Royal ISD.

During the 1982-83 school year, under requirements of P.L. 94-142, the Texas Education Agency did initially approve some federal funds under P.L. 94-142 EHA Part B for the Waller Co-op which included Waller ISD, Hempstead ISD, and Royal ISD as members. No funds were provided directly to Royal ISD; however, under federal requirements that the state arrange for services to handicapped children if a local district was unwilling or unable to provide appropriate services, the Waller Co-op initially did provide some educational services to handicapped children in Royal ISD with federal funds.

Because of the expressed concern that federal funds not be provided to Royal ISD, we arranged for the Waller Co-op to make necessary accounting adjustments whereby federal funds directed toward students in Royal ISD were credited back to the co-op project and state funds were charged for the services for children in Royal ISD. The released federal funds were then restricted to services for children in Hempstead ISD and Waller ISD. By this action no federal funds benefitted Royal ISD or students in Royal ISD. However, it should be pointed out that we believe our previous arrangement was proper under the requirements of P.L. 94-142.

I would like to request that OCR review this apparent conflict in requirements where on the one hand no funds may be provided to a district on noncompliance status, and on the other, where states are required to arrange for services to handicapped children. While we have solved this particular case by restricting all services in Royal ISD to those provided with state and local funds, we do need guidance from OCR on this apparent conflict.

If I can be of further assistance, please let me know.

Sincerely,

W. N. Kirby, Deputy Commissioner
for Finance and Program Administration

sl

cc Rick Arnett
Charles Russell
Dick Jarrell
Gerald Slater

WALLER COUNTY SPECIAL SERVICES CO-OP
SERVING EXCEPTIONAL CHILDREN OF HEMPSTEAD, ROYAL, WALLER
P.O. BOX 48
OFFICE OF THE DIRECTOR WALLER, TEXAS 77484 PHONE [illegible]

June 15, 1983

Dr. John A. Bell, Division Director
Elementary and Secondary Education
U.S. Department of Education
1200 Main Tower Building
Dallas, Texas 75202

Ref: 06831012 WCSSC
06831013
06831014
06831025 Royal

Dear Dr. Bell,

Mr. George Cole of your staff and I have examined the financial records concerning the purchase of goods and services provided the Royal I.S.D. during the 1980-81, 1981-82, and 1982-83 school years. We have looked at purchase orders and vouchers.

The evidence available to us indicates the following: at no time has any personnel been provided to Royal through federal funds; at no time has there been any property bought for Royal nor have there been any property improvements in Royal; at no time have any durable goods been purchased for the Royal I.S.D.

The only way that Royal students have benefited has been through the use of services and materials. Federal monies have been used to provide occupational therapy and physical therapy. Federal monies have been used to purchase diagnostic services, diagnostic materials, teaching materials, and transportation services.

The Waller I.S.D., as fiscal agent does have a list of teaching materials that were bought for Royal I.S.D. teachers. Such teaching materials as have been bought and placed in Royal and have not yet been ruined, lost, or used up are all of the tangible materials that one can lay one's hands on. Every bit of durable goods (vehicles, buildings, etc) is physically located in Waller and is under the control of the fiscal agent.

If further information is needed concerning the expenditure of federal funds in the Royal I.S.D. please let me know.

Sincerely yours,

Fred Wiesner
Fred Wiesner
Director

FW/cas
cc: Dr. Gerald Slater
Dr. Frank Jackson

Texas Education Agency

- STATE BOARD OF EDUCATION
- STATE COMMISSIONER OF EDUCATION
- STATE DEPARTMENT OF EDUCATION

201 East Eleventh Street
Austin, Texas
78701

May 25, 1983

Dr. John Bell, Division Director
Elementary and Secondary Education
U. S. Department of Education
1200 Main Tower Building
Dallas, Texas 75202

Dear Dr. Bell:

In follow-up to our conversation concerning the non-compliance status of Royal Independent School District, adjustments have been made to the funding arrangement for the Waller Special Education Cooperative.

In order to avoid any conflict with federal regulations, all benefits received by special education students enrolled in Royal ISD will be supported by state dollars only. No federally funded programs or services will be provided to Royal ISD.

If further clarification is needed, please contact me.

Sincerely,

W. N. Kirby, Deputy Commissioner
for Finance and Program Administration

sl

cc Gerald Slater, Waller ISD
Frank Jackson, Royal ISD

RECEIVED
ED-OCR-REGION VI
1983 MAY 26 PM 2:34

"An Equal Opportunity Employer"

ROYAL INDEPENDENT SCHOOL DISTRICT
P. O. BOX 247
BROOKSHIRE, TEXAS 77423

OFFICE OF THE SUPERINTENDENT

May 10, 1983

Dr. John A. Bell, Division Director
Elementary and Secondary Education
U.S. Department of Education
1200 Main Tower Building
Dallas, TX 75202

Dear Dr. Bell:

The Royal Independent School District does not discriminate in any way against any group of students involved in our special education program. We do not, however, see any reason to sign the civil rights certificate, as it is in consideration of and for the purpose of obtaining federal funds. As the district does not and has not received federal funds nor wishes to receive federal funds, then no purpose would be served by our signing such a certificate.

Sincerely,

Frank Jackson

Dr. Frank Jackson,
Superintendent of Schools

FJ:dh

RECEIVED
ED-OCR-REGION VI
1983 MAY 12 AM 9 43

CIVIL RIGHTS CERTIFICATION

ASSURANCE OF COMPLIANCE WITH TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, SECTION 504 OF THE REHABILITATION ACT OF 1973, TITLE IX OF THE EDUCATION AMENDMENTS OF 1972, AND THE AGE DISCRIMINATION ACT OF 1975

The applicant provides this assurance in consideration of and for the purpose of obtaining Federal grants, loans, contracts (except contracts of insurance or guaranty), property, discounts, or other Federal financial assistance to education programs or activities from the Department of Education.

The applicant assures that it will comply with:

1. Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000d et seq., which prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving Federal financial assistance.

2. Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, which prohibits discrimination on the basis of handicap in programs and activities receiving Federal financial assistance.

3. Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. 1681 et seq., which prohibits discrimination on the basis of sex in education programs and activities receiving Federal financial assistance.

4. The Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101 et seq., which prohibits discrimination on the basis of age in programs or activities receiving Federal financial assistance.

5. All regulations, guidelines, and standards lawfully adopted under the above statutes by the United States Department of Education.

The applicant agrees that compliance with this Assurance constitutes a condition of continued receipt of Federal financial assistance, and that it is binding upon the applicant, its successors, transferees, and assignees for the period during which such assistance is provided. The applicant further assures that all contractors, subcontractors, subgrantees or others with whom it arranges to provide services or benefits to its students or employees in connection with its education programs or activities are not discriminating in violation of the above statutes, regulations, guidelines, and standards against those students or employees. In the event of failure to comply the applicant understands that assistance can be terminated and the applicant denied the right to receive further assistance. The applicant also understands that the Department of Education may at its discretion seek a court order requiring compliance with the terms of the Assurance or seek other appropriate judicial relief.

The person or persons whose signature (s) appear(s) below is/are authorized to sign this application, and to commit the applicant to the above provisions.

1-14-83
Date

Authorized Official(s)

Waller I.S.D. and Fiscal Agent for Special Ed Coop
Name of Applicant or Recipient

P.O. Box 377
Street

Waller, TX 77484
City, State, Zip Code

[This is a memo to the files from Harold Rennett, an attorney in the Policy and Enforcement Service.]

TAB G

9/10/85

I talked to Frank Cedo of Region II today regarding the status of OCR's disagreements with various New Jersey institutions regarding their failure to provide sign language interpreters to deaf students. What follows is a summary of my Mr. Cedo's comments to me; all of the information set forth below was provided by Mr. Cedo and none of it derives from any first-hand knowledge of my own.

Apparently, over the last year, Region II, believing that individual site reviews at each institution were not necessary, contacted each of the public institutions of higher education in New Jersey regarding their policies in this regard. Most of the schools had no policy per se, having never been confronted with a request for an interpreter. Most of the other schools were under the impression that the State Attorney General had issued an opinion to the effect that sign language interpreters need not be provided by institutions; hence, they advocated policies similar to that espoused by the Attorney General.

Region II, through negotiation with each institution and with concerned deaf individuals and groups, has now convinced each public institution except the County College of Morris to adopt a policy of providing all auxiliary services that its deaf students reasonably believe they need. All complaints that had been filed with Region II against New Jersey public institutions, except the complaint filed by Wendy Smith against the County College of Morris, have now been resolved. Region II -- or, at minimum, Mr. Cedo -- is now satisfied that, except at the County College of Morris, the provision of sign language interpreters by New Jersey public institutions is not a major problem. Indeed, Union County College, one of the most recalcitrant institutions on this issue and one of the institutions against whom a complaint had been filed, has recently agreed to provide the services needed by a complaining deaf student and to bring its policies regarding this issue in line with OCR policy.

Harold Rennett

UNITED STATES GOVERNMENT
# memorandum

85-177.
97

DATE: May 6, 1985

REPLY TO ATTN OF: Charles J. Tejada, Regional Director
Office for Civil Rights, Region II

SUBJECT: County College of Morris, 02-83-2029
Proposed Enforcement Proceedings

TO: Harry M. Singleton
Assistant Secretary for Civil Rights

This is in response to your memorandum of April 17, 1985, concerning the Region's recommendation that enforcement proceedings be initiated against the County College of Morris (CCM) because of its failure to provide a sign language interpreter to a qualified deaf student. You have indicated that, given the fact that the Region has other complaints against New Jersey institutions regarding this same policy, we should explore the advantages of filing either a statewide enforcement proceeding or an enforcement proceeding against multiple institutions in New Jersey. Toward this end, you have requested that we provide you with information about all other complaints that have been filed against New Jersey institutions advocating the same policies as CCM.

With your concurrence, on January 17, 1985 we notified Union County College (UCC), Cranford, New Jersey, that it had violated Section 504 in three complaints for its failure to provide sign language interpreter services to qualified deaf students. These three cases are: 84-2008, 84-2026, and 84-2029. On March 22, 1985, OCR staff met with UCC officials to attempt voluntary compliance prior to recommending the initiation of enforcement proceedings to Headquarters. UCC indicated its desire to review its policy with the goal of complying with Section 504. On May 3, 1985, UCC advised OCR, in writing, that it is committed to providing appropriate services to the three complainants and that, in the future, it agrees to abide by the appropriate statutory regulations and guidelines. The Region is preparing violation corrected Letters of Findings in these three complaints.

We are currently investigating a complaint filed against Somerset County College, Somerset, New Jersey alleging denial of sign language interpreter services. Preliminary analysis during the desk audit stage leads us to believe that we may have to refer this complaint to Headquarters for concurrence with violation findings. The complaint is Kaufman v. Somerset County College, Docket Number 85-2025, Adams LOF due date: June 4, 1985. We will keep you apprised of developments in the event negotiations are unsuccessful.

After careful consideration, it is the Region's opinion that at the present time we should proceed with enforcement proceedings only against the County College of Morris.

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-114

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

TO : Charles J. Tejada
Regional Civil Rights Director
Region II

DATE APR 17 1985

FROM Harry M. Singleton
Assistant Secretary
for Civil Rights

SUBJECT: County College of Morris, OCR No. 02-83-2029 -- Proposed Enforcement Proceedings

I have reviewed your memorandum dated November 2, 1984, recommending that enforcement proceedings be initiated against the County College of Morris (CCM), located in Morris County, New Jersey, because of its failure to provide a sign language interpreter to a qualified deaf student.

I concur with your belief that it would be appropriate for OCR to initiate enforcement proceedings against CCM. However, I note that in a number of places in the files you provided me regarding this case, references are made to the fact that there have been other complaints filed with Region II against other New Jersey institutions that have policies similar to that of CCM regarding the providing of auxiliary services to deaf students. The objectionable policies advocated by CCM appear to include:

(1) that a handicapped student's ability to pay for a particular auxiliary aid relieves CCM of any legal obligation to provide such an aid;

(2) that the designation, for purposes of the Rehabilitation Act of 1973, of the New Jersey Division of Vocational Rehabilitation as the sole state agency for the administration of vocational rehabilitation programs in New Jersey relieves CCM of any legal power or obligation to provide auxiliary services to qualified handicapped students;

(3) that CCM has no obligation to pay for auxiliary services for any qualified handicapped student who resides in any of a number of New Jersey counties that, under New Jersey law, have governmental bodies which, by contract, have agreed to pay CCM to provide, to their counties' residents, educational programs not offered by those counties; and

(4) that CCM has no obligation to provide a sign language interpreter to a deaf student such as the complainant, who contends, as many deaf students contend, that a note taker is not a fully adequate substitute for a sign language interpreter in making oral classroom presentations as available to deaf students as such presentations are made available to students who are not deaf.

In light of your reference to other complaints filed with Region II regarding New Jersey institutions that advocate one or more of the policies listed above, OCR should explore the possible advantages of filing either a statewide enforcement proceeding or an enforcement proceeding against multiple institutions. Also, if OCR has available to it a number of potential individual enforcement cases that could be brought against a New Jersey institution regarding the subject policies, OCR should make certain that it initiates enforcement activity in the case that presents, in the litigative sense, the most favorable factual situation. For example, the CCM case possesses a number of factual characteristics that are not optimal for litigative purposes, including the facts that (a) the complainant is no longer enrolled at CCM; (b) the complainant apparently never was enrolled in a CCM program that received Department of Education (ED) funding; and (c) the complainant does not have a clear present motivation or desire to testify in an OCR enforcement proceeding.

Therefore, Region II should provide to me, as soon as possible, information regarding the substance and status of all other complaints that have been filed against New Jersey institutions regarding any of the policies listed above. In addition, please indicate, for each case, whether the complainant (a) is still enrolled at the institution in question, (b) whether OCR is aware of the identity of any student other than the complainant that is being disadvantaged by the challenged policies of the institution, (c) whether the complainant or any other aggrieved student is or was enrolled in a program receiving ED funding, and (d) whether it appears likely that the complainant or any other aggrieved student will be prepared to testify in an OCR enforcement proceeding regarding the challenged policies. Region II should provide similar information with respect to all program reviews it has conducted at New Jersey institutions that advocate any of the policies listed above.

attention FV

UNITED STATES GOVERNMENT

memorandum

DATE: March 7, 1985

REPLY TO ATTN OF: Frank D. Cedo, Division Director
Postsecondary Education Division
Office for Civil Rights, Region II

SUBJECT: Smith v. County College of Morris
#02-83-2029

TO: Stephanie White, Attorney-Advisor
Office of the Assistant Secretary
for Civil Rights

As you know, on November 1, 1984, we had submitted the above-referenced case to headquarters with a recommendation that enforcement proceedings be initiated. It is the opinion of the Region that all efforts to effect voluntary compliance have now been exhausted and, therefore, we are resubmitting our recommendation for enforcement.

On December 27, 1984, you advised the Region that the EAR was being reviewed. You asked that we make a final attempt to determine whether the County College of Morris (the College) would reconsider its position on the provision of sign language interpreter services for deaf students. At a January 30, 1985 meeting between OCR staff and College officials, the College reiterated its position, namely that although it is willing to assist student in obtaining sign language interpreter services, it cannot offer an assurance that it will accept ultimate responsibility for the provision of required services. Attached is a copy of the most recent correspondence from the College, dated February 25, 1985, confirming the position detailed in earlier correspondence. As you can see, the College's position, that it will not change its policy, remains firm.

Recently, you inquired about the relationship of the College to the state college system, and whether there is a governing state policy with regard to the provision of sign language interpreter services. Although the county colleges were established by state law and they receive county and state monies, they are not a part of the New Jersey State college system. As far as we can determine, there is no official state policy on the provision of sign language interpreters that would govern the College's position. There is a July 16, 1979 memorandum from the Deputy Attorney General to state college presidents, advising them that in light of the Southeastern Community College v. Davis case, they need not provide hearing-impaired students with interpreters to assist them in the classroom. The memorandum proceeds to explain that if colleges have the funds and wish to establish interpreter services, they are free to do so. The County College of Morris has indicated that although it was not aware of this memorandum until we brought it to their attention, it does reflect the College's own position. Interestingly, the author of the memorandum is the College's current legal counsel.

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-114

In summary, since we cannot secure voluntary compliance, we are requesting that you proceed with our earlier recommendation for initiation of enforcement proceedings.

Attachments

TAB H

In 1982, the Office for Civil Rights initiated proceedings In The Matter of Governors State University, Chicago State University, et al., Docket Nos. 82-V-1 and 82-V-2 to compel Governors State University and Chicago State University to allow OCR access to information necessary to investigate allegations of race, national origin and sex discrimination under Titles VI and IX. The institutions denied OCR access on the basis that OCR lacked jurisdiction to investigate the complaints in question since the alleged discrimination did not take place in a program or activity receiving Federal financial assistance. OCR argued that it did have jurisdiction since the institutions in question enrolled students who received Federal financial assistance which, in turn constituted assistance to the Universities.

Since the only issue involved in this consolidated proceeding was the scope of OCR's jurisdiction, all parties agreed to stipulate to the facts and oral argument was scheduled before the ALJ for August 26, 1983. OCR and the Universities submitted briefs on their respective positions to the ALJ in May and July 1983.

On August 12, 1983, the Solicitor General of the United States filed a brief in Grove City v. Bell with the U.S. Supreme Court, in which the United States argued that receipt of student financial aid by Grove City College gave OCR jurisdiction over the financial aid office only and not the rest of the institution.

The position taken by the United States in Grove City was the position taken by Governors State and Chicago State before the ALJ.

Two days before oral argument was scheduled, August 24, 1983, the OCR attorneys moved to stay the administrative proceeding until the Supreme Court ruled in Grove City v. Bell. The ALJ denied the motion and the OCR attorneys then moved to dismiss the case without prejudice. This motion was granted.

When the Assistant Secretary discovered that the case had been dismissed, he had the OCR attorneys on October 5, 1983, file a motion to withdraw the motion to dismiss, on the basis that OCR would prosecute these cases under the legal theories articulated in its briefs, notwithstanding the position taken by the Solicitor General in the Grove City case. The motion was denied, with the ALJ noting that the case was dismissed without prejudice and OCR could initiate new administrative proceedings in the same issue. At this point, OCR decided to wait until the Supreme Court ruled in Grove City v. Bell.

On February 29, 1984, the Supreme Court decided Grove City v. Bell, largely accepting the position of the Solicitor General. Since then, OCR has been re-examining the data concerning Governors State and Chicago State to determine whether OCR has overlooked any Federal assistance received by Governors State and Chicago State which would provide OCR with jurisdiction under the standards articulated by the Supreme Court in Grove City v. Bell.

TAB I

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

DATE NOV 2 1984

TO : Linda A. Cornelius
Acting Regional Civil Rights Director
Region V

FROM : Harry M. Singleton
Assistant Secretary
for Civil Rights

SUBJECT: Reevaluation of Governors State University/Chicago State University in Light of Grove City

Attached are the files and the financial data that you requested for OCR Docket Nos. 05792004, 05792101, 05802102, 05802056, 05812004, 05812088, 05812091, and 05822026. I agree that it is appropriate to reanalyze these cases consistent with my memorandum of July 31, 1984.

Attachments

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

Distribute to RE

DATE JUL 31 1984

TO : Regional Civil Rights Directors
Regions I - X

FROM : Harry M. Singleton
Assistant Secretary
for Civil Rights

SUBJECT: Analysis of the Decision in Grove City College v. Bell and Initial
Guidance on its Application to OCR Enforcement Activities

I. SUMMARY

In Grove City College v. Bell, 104 S. Ct. 1211 (1984) (hereinafter referred to as Grove City), a six-member majority of the Court held that where a College's receipt of Federal financial aid is limited to student financial assistance in the form of Basic Educational Opportunity Grants (BEOGs), the Department of Education's jurisdiction is limited to the recipient's student financial aid program. This memorandum provides initial guidance in applying the Grove City decision to OCR's jurisdiction under some of the Department of Education's funding statutes, such as School Assistance in Federally Affected Areas (SAFA/Impact Aid) and the Education of the Handicapped Act (EHA), and for some issues, such as admissions and site selections. This guidance was developed in conjunction with the Office of the General Counsel. Additional guidance will be provided for funding statutes and issues not discussed herein. In the meantime, my directive of June 22, 1984, instructing you to take no action restricting investigations is operative when a question remains as to jurisdiction which is not addressed in this memorandum. Instead, contact headquarters immediately before taking any action.

II. ANALYSIS OF THE DECISION IN GROVE CITY

A. Background

In July 1977, the Department of Health, Education and Welfare (HEW) sought to secure an assurance of compliance with Title IX from Grove City College, Grove City, Pennsylvania. The College refused. What ensued was a series of court battles which ended in the February 28, 1984 decision of the Supreme Court in Grove City College v. Bell. During this seven-year period, as the case was successively argued before four separate tribunals, both the parties and their presentation of the issues changed. The Department of Education was created and assumed HEW's role in the case and several students joined as plaintiffs with the College. The focus of the case, increasingly became one of defining what constituted a "program or activity," as that term is employed in § 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), which prohibits sex discrimination in "any education program or activity receiving Federal financial assistance." The history of this issue is summarized by the Court.

> The Department initially took the position that the receipt of student financial aid would trigger institution-wide coverage under Title IX and construed its regulations to that effect. It pressed that position in the lower courts. In their brief in opposition to the petition for certiorari, respondents did not defend this aspect of the Court of Appeals' opinion, but argued instead that the question need not be resolved to decide the case. In their brief on the merits and in the oral argument, however, respondents conceded that the Court of Appeals erred in holding that Grove City itself constituted the "program or activity" subject to regulation under Title IX.

Grove City College v. Bell, 104 S. Ct. 1211, 1216 n. 10 (1984). It is the purpose of this memorandum to determine OCR's jurisdiction under the Department's many funding statutes. However, because of the number of statutes and the complexity of the issues involved, the guidance provided is necessarily incomplete. Additional written guidance will be forthcoming.

B. Statement of the Issues

The case presented four issues to the Court.

1. Whether an educational institution is a recipient of Federal financial assistance by virtue of its students' receipt of Basic Educational Opportunity Grants (BEOG). 1/
2. Whether refusal to execute the Assurance of Compliance form, as required by the Title IX regulation, warrants termination of Federal financial assistance to the program or activity receiving said assistance.
3. Whether requiring the institution to comply with the nondiscrimination provisions of Title IX, as a condition for continued eligibility to participate in the BEOG program, infringes the institution's or its students' First Amendment rights.
4. If BEOG's do constitute Federal financial assistance to the institution, whether the scope of coverage under Title IX is institution-wide.

1/ Although some of the College's students receive Guaranteed Student Loans, the Department did not appeal from that portion of the district court's decision. This left standing in the U.S. District Court for the Western District of Pennsylvania the determination that GSLs are Federal financial assistance within the meaning of Title IX but are not subject to the provisions of Title IX because they are expressly exempt as contracts of insurance or guaranty. Grove City College v. Bell, 687 F.2d 684, 69[illegible] n. 10 (3rd Cir. 1982).

C. Opinions of the Court

All members of the Court agreed on the resolution of the first three issues numbered above. Thus, Grove City can clearly be said to hold as follows:

- That the College is a recipient of Federal financial assistance by virtue of its participation in the BEOG program. 2/
- That the refusal to execute the Assurance subjected those programs and activities at the College which received Federal funding to the Department's termination authority. 3/
- That imposing Title IX requirement upon the College does not violate its First Amendment rights. 4/

2/ Citing with approval Bob Jones University v. Johnson, 396 F. Supp. 597, (D.S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975), the Court concludes:

> Nothing in [the statute] suggests that Congress elevated form over substance by making the application of the nondiscrimination principle dependent on the manner in which a program or activity receives federal assistance. There is no basis in the statute for the view that only institutions that themselves apply for federal aid or receive checks directly from the federal government are subject to regulations.

104 S. Ct. at 1217.

3/ With regard to the legality of terminating funding for a violation of the technical requirements of the Title IX Regulation without a showing of gender discrimination, the Court held that "the Department may properly condition Federal financial assistance on the recipient's assurance that it will conduct the aided program or activity in accordance with Title IX and the applicable regulations." Grove City, 104 S. Ct. at 1223. The Court reasoned that the statute does not require that "termination must be preceded by a finding of actual discrimination." Id. at 1222. It further reasoned that Congress was aware that the Title VI regulation provided for termination for failure to execute an assurance and "no doubt anticipated that similar regulations would be developed to implement Title IX." Id. at 1223.

4/ The Court made very short shrift of the First Amendment issue. Citing Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981), the Court reiterated that Congress may "attach reasonable and unambiguous conditions to federal financial assistance." 104 S. Ct. at 1223. The Court noted that the College and its students are free to not participate in the Federal assistance program if they wish to be free of Federal obligation. Thus, "[r]equiring Grove City to comply with Title IX's prohibition of discrimination as a condition for its continued eligibility to participate in BEOG program infringes no First Amendment rights of the College or its students." 104 S. Ct. at 1223.

Finally, regarding the definition of "program or activity," the Court split into four separate opinions. Justice White, writing for a six-member majority, stated the holding of the case as follows:

> [T]he receipt of BEOGs by some of Grove City's students does not trigger institution-wide coverage under Title IX. In purpose and effect, BEOGs represent federal financial assistance to the College's own financial aid program, and it is that program that may properly be regulated under Title IX.

104 S. Ct. at 1222.

Justice Powell, writing also for Chief Justice Burger and Justice O'Connor, "reluctantly" concurred with the majority decision but filed a separate opinion "to record my view that the case is an unedifying example of overzealousness on the part of the Federal Government." Id. at 1223.

Justice Stevens refused to join the majority in its definition of "program or activity" on the grounds that the Court had reached an issue not in controversy before it and, consequently, had improperly issued an advisory opinion based on speculation rather than evidence. 104 S. Ct. at 1224 and 1225.

Justice Brennan and Justice Marshall also refused to join the majority. However, unlike Justice Stevens who disputed the justiciability of the question but took no position on the merits, Justices Brennan and Marshall went on record as rejecting the majority's interpretation of the law:

> By conveniently ignoring . . . controlling indicia of congressional intent, the Court also ignores the primary purposes for which Congress enacted Title IX. The result . . . may be superficially pleasing to those who are uncomfortable with federal intrusion into private educational institutions, but it has no relationship to the statutory scheme enacted by Congress.

Id. at 1226.

D. The Majority Definition of "Program or Activity"

The majority begins its analysis of the "program or activity" issue by observing that it would have "no doubt" that jurisdiction over Grove City College would be limited to its student financial aid program if the College's participation in the BEOG program were through the Regular Disbursement System (RDS), rather than through the Alternate Disbursement

System (ADS). 5/ The Court reasons that RDS necessarily precludes recipient-wide jurisdiction because institutions using this procedure are not given any discretion in the application of the funds.

> RDS institutions receive federal funds directly, but can use them only to subsidize or expand their financial aid programs and to recruit students who might otherwise be unable to enroll. In short, the assistance is earmarked for the recipient's financial aid program.

104 S. Ct. at 1221. The Court does not reason to this conclusion but reasons from it to find Title IX jurisdiction limited to the College's financial aid office. If there can be said to be a legal test in *Grove City* for determining "program or activity," it begins with a determination of whether the funding granted to the recipient is "earmarked" or "nonearmarked."

The Court acknowledges that Federal student aid contributes to the recipient's entire budget. However, without elaborating, the Court simply concludes that "the fact that federal funds eventually reach the College's general operating budget cannot subject Grove City to institution-wide coverage." *Id.* at 1221. The Court also rejects the argument that Federal student aid allows the institution to divert its own funds to other programs and, consequently, indirectly accrues to the benefit of those programs. The Court finds no evidence of reallocation of resources and concludes that assuming indirect benefit to other program areas is "inconsistent with the program-specific nature of the statute." *Id.* at 1221. Hence, the financial aid program is the "program or activity receiving Federal financial assistance" for the purpose of asserting jursidiction.

The Court finds the appellate decision's analogy between student aid and nonearmarked aid "more plausible . . . but it too is faulty." *Id.* What is at fault is the lower court's failure to see Federal student aid as *sui generis*, or one of a kind, not exactly earmarked and not exactly nonearmarked. However, as between the two types of funding, the Court opined, Federal student aid "more closely resembles many earmarked grants" because it has the effect of imposing the obligation on the recipient to use the funds only for students who would otherwise be unable to afford higher education. *Id.* at 1221 and 1222. In other words, Congress specified the use to which the money was to be put and the recipient was not free to use it in another manner. In again dismissing the argument that the funds reach the general operating budget, the Court stated that it had "found no persuasive evidence suggesting that Congress intended that

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5/ The Court continues to say that there is no reason to distinguish the RDS and ADS programs for jurisdictional purposes simply because under the latter the Government disburses the funds directly to the student and under the former the Government disburses them indirectly to the student through the educational institution. "Although Grove City does not itself disburse students' awards, BEOGs clearly augment the resources that the College itself devotes to financial aid." *Id.* at 1221.

the Department's regulatory authority to follow federally aided students from classroom to classroom, building to building, or activity to activity." 104 S. Ct. at 1221.

One final note, although funds may not be traced beyond the program to which the funds have been earmarked, all activities of that program are subject to the Department's jurisdiction.

> There is no merit to Grove City's argument that the Department may regulate only the administration of the BEOG program. Just as employees who "work in an education program that receive[s] federal assistance," *North Haven Board of Education v. Bell* . . . are protected under Title IX even if their salaries are "not funded by federal money," *ibid.*, so also are students who participate in the College's federally assisted financial aid program but who do not themselves receive federal funds protected against discrimination on the basis of sex.

104 S. Ct. at 1221 n. 21. Thus, athletic student financial aid must be administered in a nondiscriminatory manner if the student financial aid program receives Federal student aid.

III. APPLICATION OF THE *GROVE CITY* DECISION

Although the facts of the case placed the *Grove City* holding in the context of Title IX, there is no doubt that the Court's decision is applicable to OCR's other statutory authorities which include the phrase "program or activity receiving Federal financial assistance." This is illustrated by a decision rendered on the same day as *Grove City*. In *Consolidated Rail Corporation v. Darrone*, 104 S. Ct. 1248, 1255 (1984), the Court expressly relied on *Grove City* and *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982) to observe that "Section 504, by its terms, prohibits discrimination only by a 'program or activity receiving Federal financial assistance.' . . . Clearly, this language limits the ban on discrimination to the specific program that receives federal funds." Moreover, the "program or activity" language in Title IX, Section 504, and the Age Discrimination Act was modeled after the language of Title VI. Therefore, the *Grove City* decision applies to the jurisdictional scope of Title VI, Section 504, and the Age Discrimination Act, as well as Title IX.

In reviewing complaints to determine whether or not OCR has jurisdiction over the alleged discrimination, one must first determine whether the funding received by the institution is earmarked or nonearmarked. If the funding is nonearmarked, jurisdiction may be asserted recipient-wide. If the funding is earmarked, jurisdiction may only be asserted over the program of the recipient receiving the earmarked funds and accomplishing the statutory purpose. The only Department of Education program which has been identified as nonearmarked is Impact Aid.

A. *Application of the Grove City Decision to Federal Assistance Statutes*

The Department disburses funds for numerous programs of Federal assistance. At the elementary and secondary education level, this memorandum analyzes

OCR's jurisdiction under most of the Department's largest grant programs. Moreover, given the memorandum's conclusions concerning the broad jurisdiction provided by Chapter 2 of the Education Consolidation and Improvement Act and by SAFA (Impact Aid), it should be unnecessary in most cases to consider the jurisdiction conferred by other funding statutes. At the postsecondary level, this memorandum analyzes the jurisdiction conferred by several important funding statutes. This examination has not been exhaustive. You will be provided with further written guidance as needed. In the meantime, take no action restricting investigations where a question remains as to jurisdiction which is not addressed in this memorandum. Instead, contact headquarters immediately before taking any action.

School Assistance in Federally Affected Areas (Impact Aid) -- Impact aid payments to a local educational agency (LEA) provide general aid to the recipient to meet its general operating expenses. The program assisted is the overall operations of the recipient LEA, including its elementary and secondary education program. The purpose of the statute is to compensate school district's for the costs of serving children whose parents reside or work on Federal property (which is not subject to local property taxes). Impact aid payments, unlike grants under the Department's categorical grant programs, may be used for any purpose.

Unlike the BEOGs at issue in Grove City, Impact Aid funds constitute nonearmarked, unrestricted payments as most LEAs deposit these payments in their general fund and the statutory purpose and use are not restricted in any way. As a result, all of the programs and activities of the LEA are subject to OCR's jurisdiction.

Vocational Education Act -- The purpose of the Vocational Education Act (VEA) is to assist States in improving planning and in conducting vocational programs at the State and local level for persons of all ages who desire and need vocational training for employment. VEA funds are earmarked for use in the recipient's vocational education program. Therefore, the entire vocational education program, and not just the portion of the progra conducted with VEA funds, is subject to OCR jurisdiction. For example, an institution may not argue that its horticulture curriculum, which receives VEA funds, is within OCR jurisdiction, while its welding curriculu is not because it does not use VEA funds.

Education of the Handicapped Act (EHA) - Part B -- The purpose of Part B of the EHA, 20 U.S.C. 1411 et seq., is to assist states and localities in providing a free appropriate public education to all handicapped childre The funds are earmarked for use in the recipient's special education progra As with VEA funding, it should be noted that all aspects of the special education program come within OCR's jurisdiction, not just those elements which can be shown to receive EHA funding.

Chapter 1 of the Education Consolidation and Improvement Act of 1981 (Chapter 1) -- The purpose of Chapter 1, 20 U.S.C. § 3801 et seq., is to provide financial assistance to meet the special educational needs of educationally deprived children. Chapter 1 funds are earmarked for use in providing services, including such compensatory services as remedial reading and math, to meet the special educational needs of educationally deprived children. Most recipients which receive

Chapter 1 funds operate a "Chapter 1 program" which provides the above services to educationally deprived children. In addition, similar services are often funded by state and local money as well as by Federal Chapter 1 funds. All aspects of a recipient's program of services, including compensatory education services, to meet the special education needs of educationally deprived children, therefore, are within OCR's jurisdiction.

Chapter 2 of the Education Consolidation and Improvement Act of 1981 (Chapter 2) -- Chapter 2 consolidates into a block grant approximately 40 categorical programs at the elementary and secondary level, 20 U.S.C. § 3811 et seq. The purpose of the statute is to assist SEAs and LEAs to improve elementary and secondary education by giving them expanded authority over how to spend funds. SEAs and LEAs may select from among very broad categories of purposes and activities that encompass all of the purposes and activities previously authorized under the antecedent categorical programs. Some of the purposes and activities include instruction in basic skills; acquisition and utilization of instructional materials and equipment; development of programs to improve educational practices; the improvement of planning, management, and implementation of educational programs; teacher training; desegregation; etc. Thus, subject to such statutory and regulatory requirements as supplement not supplant, Chapter 2 payments may be used by an LEA at its complete discretion to provide financial aid to any and all elementary and secondary education programs, and to activities to manage or administer the school system.

The range of programs for which Chapter 2 funds may be used reaches throughout the school district's programs, limited only by any restrictions under State law on the definition of what constitutes elementary and secondary education. Therefore, there is a presumption that all of an LEA's programs and activities are subject to OCR's jurisdiction. That presumption can be rebutted by an LEA only by demonstrating that the program or activity is not part of its elementary and secondary education program as defined by State law, and is not part of the management or administration of its school system.

Student Financial Assistance -- The Court's decision with respect to BEOGs is applicable to other forms of student financial assistance. Specifically, OCR's jurisdiction is the student financial aid office where the recipient's only form of Federal financial assistance is National Direct Student Loans, Supplemental Educational Opportunity Grants, and State Student Incentive Grants. While the receipt of College Work Study monies conclusively establishes jurisdiction over the financial aid office, we are continuing to analyze the issue as to whether it confers jurisdiction over other programs at the institution. Until this analysis is complete, take no action restricting investigation to the financial aid office when College Work Study monies are at issue.

Construction, Reconstruction, and Renovation of Academic Facilities (Facilities Assistance) -- The purpose of Facilities Construction is to assist higher education institutions by providing grants and loans for the construction, reconstruction, or renovation of academic facilities. 20 U.S.C. § 1132a. Because these grants and loans may relate to any academic facility and are not limited to particular departments or categories of programs, the assisted programs and activities will be those which use the buildings which received Federal funds for their construction, reconstruction and renovation. The entire program which uses a federally assisted building, including those aspects of the program which are conducted in nonfederally funded facilities would be subject to OCR's jurisdiction.

Grants for Academic Programs -- As to earmarked grants given for use by a particular academic program, for example a grant for research concerning the effect of nicotine on rats' lungs, the academic program, here the Biology department, is subject to OCR's jurisdiction. All aspects of that program, including those funded from non-Federal sources, are subject to OCR's jurisdiction.

B. *Application of the Grove City Decision to Specific Issues*

It is impossible to enumerate all the various factual situations to which *Grove City* will be applied in the course of OCR's enforcement activities. However, guidance can be provided on some questions.

Admissions and Recruitment -- OCR has jurisdiction to investigate the admissions and recruitment practices and procedures of any recipient of Federal funds even though the funds may be earmarked to an organizational subunit. This position is enunciated in *Rice* v. *President & Fellows of Harvard College*, 663 F.2d 336, 339 n.2 (1st Cir. 1981), *cert. denied*, 456 U.S. 928 (1982): "One who is discriminated against in seeking admission is denied access to all educational programs and activities within an institution, and the entire body of programs within the school is tainted." *Accord* *Bob Jones University* v. *Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd*, 529 F.2d 514 (4th Cir. 1975). This view was presented to the Court in the Government's brief. Brief for the Respondents at 19 and 20, *Grove City*. Although the Court's silence in the *Grove City* opinion on the questio of admissions is not dispositive, absent direction from the Court, OCR will continue to apply existing case law on the subject by exercising recipient-wide jurisdiction in response to complaints of discrimination in admissions and recruitment.

State Systems -- OCR State Systems activities stem from findings of *dejure* segregation in admissions policies and practices of entire State systems of education. Thus, with respect to OCR's jurisdiction, they fall within the admissions exception to the funding distinctions described above.

Processing Complaints -- OCR will always determine its scope of jurisdictio as defined in *Grove City*, before seeking to investigate any complaint. Where it is determined that (1) the funds at issue are earmarked and (2) OCR has jurisdiction over the program or activity complained of, OCR will initiate an investigation of the program. If the alleged discriminatory recipient disputes OCR's authority to investigate on the grounds that OCR has no jurisdiction over the program or activity at issue, OCR will request access to the recipient's record of receipt and use of Federal-funds disburs to the recipient by the Department of Education and by all other agencies which have delegated compliance responsibilities under Title VI to the Depar See 45 *Fed. Reg.* 54793 (August 18, 1980). If jurisdiction must be based on a non-Education Department statute, seek further guidance as to the purpose and nature of the Federal assistance provided. Of course, where the funds are determined to be nonearmarked, further investigation of recipie records is unnecessary because the jurisdiction is recipient-wide. In addition, OCR will continue its practice of not dismissing complaints which allege facts from which infection may be inferred.

Compliance Reviews -- Site selection for compliance reviews must take into consideration the jurisdictional limits set forth in *Grove City*. Therefore, site nominations should include a jurisdictional analysis, namely, a list of the recipient's Federal funding and a brief description of the relationship between the funding and the issue to be reviewed. Guidance provided on infection may apply to site selection as well as complaint investigations.

Denial of Access -- Failure to provide OCR with access to accounts of Federal funds will constitute a violation of 34 C.F.R. § 100.6(d). OCR must be provided with access to records detailing the use of, not simply the receipt of, Federal financial assistance. It is not enough that the recipient provides records for the limited purpose of showing that no Federal funds are received by the program at issue. OCR must be given sufficient access to determine how the monies are used. OCR's authority to require such access to determine the basis of jurisdiction is found at 34 C.F.R. § 100.6(c) and in the requirements of Federal funding statutes that recipients maintain records for the purpose of fiscal audit and program evaluation. Where an institution is found to participate in any Federal funding program OCR may, as necessary, assert jurisdiction over the institution's fiscal recordkeeping program, consistent with *Grove City*. An example of such program requirements is found in Chapter I which stipulates that "[e]ach State educational agency shall keep such records and provide such information to the Secretary as may be required for fiscal audit and program evaluation . . ." Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. § 3804(a) (1982).

IV. CONCLUSION

This memorandum has provided an analysis of *Grove City* and initial guidance in applying the holding to OCR's jurisdiction. As additional guidance will be provided for funding statutes and issues not discussed herein, the directive of June 22, 1984, instructing you to take no action restricting investigations is operative when a question remains as to jurisdiction which is not addressed in this memorandum.

Attachments

Tab A - The decision in *Grove City College* v. *Bell*.

Attachment

U.S.D.E. Grants received by the College of Human Learning and Development

77 - 13 Title: Training Program for Human Service Paraprofessionals (2nd year). GSU - Exh. C - p.22 (7/1/77 - 6/30/78)

Amount: $102,240

77 - 28 Title: Bilingual - Bicultural Competency Based Teacher Preparation. GSU - Exh. C - p. 36 (10/1/76 - 9/30/78)

Amount: $85,602

78 - 13 Title: Bilingual - Bicultural Competency Based Teacher Preparation. GSU - Exh. C - p. 66 (10/1/80 - 10/1/83

Amount: $96,552

80 - 25 Title: Bilingual - Bicultural Competency Based Education (3rd year). GSU - Exh. C - p. 187 (1-/1/80 - 9/30/81)

Amount: $95,919

80 - 35 Title: Teacher Corps Project Implementation (3rd yr.). GSU - Exh. C - p. 193 (7/15/80 - 7/14/81)

Amount: $115,987

80 - 50 Title: Bilingual - Bicultural Competency Based Masters Degree in Administration and Supervision. GSU - Exh. C - p.198 (10/1/80 - 9/30/81)

Amount: $101,714

81 - 49 Title: GSU/District #147 Teacher Corps Project (4th year). GSU - Exh. c - p. 230 (7/15/81 - 7/14/82)

Amount: $84,049

81 - 37 Title: Bilingual - Bicultural Competency Based Masters Degree in Administration and Supervision (2nd year). GSU - Exh C - p. 216 (10/1/81 - 9/30/82)

Amount: $109,166

81 - 42 Title: Competency Based Bilingual - Bicultural Higher Education Program. GSU - Exh. C - p. 221 (10/1/81 - 9/30/82)

Amount: $40,000

82 - 2 Title: Strengthening the Existing Cooperative Education Program at GSU. GSU - Exh. C - p. 236 (9/30/81 - 9/30/82)

Amount: $3,620

# 82 - 18 Title: Bilingual - Bicultural Competency Based Masters Degree in Administration and Supervision (3rd of 4 years). GSU - Exh. C - p. 241 (10/1/82 - 9/30/83)

Amount: $90,000

# 82 - 19 Title: Competency Based Bilingual - Bicultural Higher Education Project (2nd year). GSU - Exh. C - p. 247 (10/1/82 - 9/30/83)

Amount: $90,000

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION
REGION V--CHICAGO

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Harry M. Singleton
Assistant Secretary
for Civil Rights

DATE: May 10, 1985

FROM: Acting Regional Director
Office for Civil Rights, Region V

SUBJECT: Reevaluation of Governors State University (GSU) Denial of Access
Cases: #05802056, #05792102, #05792004, #05792101

In accordance with your Memorandum of November 2, 1984 (TAB A), the above referenced cases were authorized to be returned to the region for a reanalysis of OCR's jurisdiction in light of the Grove City decision. On December 7, 1984, the region then reassumed accountability for these cases and the companion cases from Chicago State University (CSU) after all the files and supporting Federal financial data had been reassembled and transferred to the region by the Policy and Enforcement Service.

The present four cases are the oldest of the eight still pending against the Illinois Board of Governors of State Colleges and Universities and these two of its member universities. Formal enforcement proceedings were initiated within the Department on September 10, 1982 on the basis of denial of access. The recipients' denial of access was founded on arguments that OCR had no authority to investigate because the complainants' allegations did not involve federally assisted programs or activities. In August 1983, OCR's counsel unsuccessfully moved that the administrative proceeding be stayed pending the Supreme Court's decision in the Grove City case. On September 6, 1983, on oral motion by the Department, the proceeding was dismissed without prejudice, effective October 6, 1983. On October 31, 1983, the Administrative Law Judge denied the Department's motion to withdraw its oral motion to dismiss and to set aside the order of September 6. These cases then remained in Headquarters without further action being taken until October 26, 1984, when the region recommended to you this new review.

Although the enforcement proceedings against the two universities had been consolidated, we decided it was more appropriate to submit our recommendations for each university separately. However, our review of the CSU cases has also been completed and will be submitted to you within the next two weeks.

"ENERGYWISE ECONOMIZE"

As detailed in the attachment, we have now completed the following steps regarding these GSU cases:

+ We have contacted or attempted to contact all the complainants to to determine whether or not they still wish to pursue their complaints.
+ We have reviewed the financial aid data (collected prior to the 1983 Administrative Proceedings) in light of your instructions of July 31, 1984, in regard to Grove City. (TAB B)
+ We have prepared updated background information on GSU including DED funding.
+ We have provided recommendations on each case for your consideration and approval.

If your staff have need of clarification, they may contact Dr. Mary Frances O'Shea, Director, Postsecondary Education Division, at 8-353-3865.

Thank you for your consideration of this matter.

Linda A. Cornelius

Linda A. Cornelius

Attachment

Governors State University Reevaluation

A. Background on Recipient: Governors State University (GSU) is one of the five state universities in Illinois responsible to the Board of Governors of State Colleges and Universities. It offers Masters programs in various disciplines as well as the Baccalaureate degree. However, only upper level undergraduate courses are offered and students are required to have completed two full years of college work on admission.

1. DED Funds: Although total enrollment has been dropping at GSU in recent years, GSU still participates in all the major DED student financial assistance programs for the 1984-85 academic year as follows:

	Awarded	Amount
Supplemental Educational Opportunity Grants	7-1-84	$ 104,126
College Work Study	7-1-84	$ 258,206
National Direct Student Loan	7-1-84	$ 194,941
Pell Grants	1-26-84	$ 83,681

The only other DED funds of record received for the 1984-85 academic year were:

Veterans Cost of Instruction Program	$ 1,228
Strengthening Developing Institutions (Title III)	$ 108,662

The region did not attempt to investigate whether or not GSU's Title III funds are now earmarked for certain programs or divisions at GSU, since we are not sure whether this information is relevant to OCR's jurisdiction over these complaints when they were filed between 1978 and 1980. The region does not have access to the recipient's Title III grant proposals, and, therefore, we could not determine whether a limited jurisdictional claim could be made on the basis of Title III funds. We also note that in Policy Guidance recently supplied to the region on another case (Elgin Community College, #05842063), you stated that Headquarters had not yet determined whether or not Title III funds convey jurisdiction over the entire institution.

GSU is located in a single unit complex built between 1971 and 1974. The region inquired whether or not DED construction grants had been received by the university for this purpose. However, telephone contacts with DED officials in Washington revealed no such grants had been awarded to GSU. In previous contacts with GSU, the Board of Governors Counsel also asserted that GSU had not received any DED construction money.

Prior to the 1983 Administrative Proceedings, complete Federal financial assistance data on GSU was provided for the years 1977 through 1982. The region has reviewed all this information and has identified the DED funds which may have a direct bearing on each of the complaints which are still open.

2. Organization of the University: Because of the nontraditional system of governance at GSU, there is particular difficulty in defining what is the applicable program or activity for each complaint being resubmitted. In the period covered by these complaints, GSU did have four separate colleges, but there were no individual academic departments, only certain program areas. Faculty members are also listed as "University Professor" with no area of specialty or assignment. The colleges are described in the catalog as being able to "establish policies and procedures as semiautonomous units." One example of this is the specific college grievance procedures used by one of the complainants, Bernice Sanders.

3. Instructional System: At the time these complaints were filed GSU assigned no grades, not even pass-fail, and students were awarded academic credit when certain competencies had been demonstrated. A student could also continue to work on earning credit for a course long after the regular term had ended. Likewise, instead of having set course requirements for each graduate degree, a student was expected to sign a contractual degree plan with his or her advisor, and academic credit might even be granted for certain life experiences pursued before admission. These unique features suggest the difficulty OCR may now have in investigating these complaints so long after the fact when some witnesses are no longer available. For the same reason it is also difficult to judge the merits of the complaints based on information supplied by the complainants themselves. GSU has since revised its grading system, and regular letter grades were first put into effect in the Fall 1979 term.

4. Compliance Activity since Grove City: The University continues to be represented by the Counsel for the Illinois Board of Governors. Only one complaint has been filed against GSU since the Grove City decision was rendered (#05842060-closed 11/6/84). This was a Title VI and Title IX employment case. GSU provided all information requested by OCR in a timely manner and raised no challenges to OCR's jurisdiction. The complainant withdrew her complaint with OCR after accepting the offer of another position at the university. Since this is the only case filed against any of the five universities since the decision, it is impossible to determine whether Counsel intends to challenge OCR in the future based on Grove City.

B. Disposition of Complaints

1. #05802056: This complaint was filed on February 19, 1980 by Ms. Lois Bobo, who alleged that she had been denied placement in a School Psychology practicum on the basis of her race and sex. The practicum was a part of the complainant's degree plan for her MA in Human Relation Services in the specialty of School Psychology. Ms. Bobo was awarded this degree in December, 1980. In previous contacts with OCR, Ms. Bobo stated she was still interested in pursuing this complaint. However, she has now formally withdrawn her complaint.

   Closed: April 19, 1985.

2. #05792004: This complaint was filed with OCR on September 28, 1978, by John Robinson, who alleged that one of his professors had discriminated against him because of his race. This professor allegedly stole Robinson's ethnic studies research for her personal use. Mr. Robinson said he then reported this to College authorities, after which his Professor subjected him to racial slurs and created problems for him in getting financial aid. However, Mr. Robinson provided no evidence that he had filed an internal grievance or that any other College officials had acted upon this matter in any way.

   During the two years after he filed this complaint, Mr. Robinson was periodically in contact with our office. Attempts to reach him in 1981 were unsuccessful, but the case was not closed because of the outstanding denial of access issue. Mr. Robinson has not inquired about his complaint since 1981.

   Mr. Robinson has never provided any evidence to support his claim or even given any coherent explanation of how the discrimination occurred. He was the only one of these GSU complainants working on an undergraduate degree - - a B.A. in Science with an emphasis on Environmental Science. This program was offered by what was then GSU's College of Environmental and Applied Sciences (CEAS). Mr. Robinson claimed that except for the discrimination he encountered in a course in Urban Ecology he would have graduated at the end of the Fall 1978 term. The GSU's Registrar's office has verifed to OCR that Mr. Robinson still does not hold any degree from GSU. Even if OCR had a copy of Mr. Robinson's transcript, it would be impossible to determine what his academic status was at the time because of the absence of grades and the flexibility of degree requirements. Mr. Robinson has not identified any student witnesses to support his complaint. Robinson's professor, a white female, was a "University Professor" in 1978 and is still listed as a faculty member at GSU as a "University Professor of Anthropology." The GSU catalogs show that she earned a Ph.D. from the University of Chicago in 1972. The CEAS has now been reorganized within a new College of Arts and Sciences. There is still no Department of either Anthropology or Environmental Science.

Letters were sent to the complainant via registered mail at two different addresses. The one to Robinson's home was returned as undeliverable, but the second was accepted by a third party on March 23, 1985. However, the telephone of the complainant's friend at this address has been disconnected. Since Mr. Robinson has not contacted us in the following month, we assume that he did not receive this letter and that we will be unable to locate him in the future.

Even if Robinson could be located and wished to pursue his complaint, OCR would have difficulty asserting jurisdiction over this complaint under a strict interpretation of Grove City:

a. Mr. Robinson asserted in his complaint that he was intending to apply for a Federal grant with his project, but he did not mention any possible DED source.

b. Mr. Robinson's degree program did not receive any DED funds at the time, and in the funding information previously submitted The College of Environmental and Applied Science in 1978 and 1979 is not listed as receiving or administering any DED funds.

c. The CEAS did employ work study students in the 1979-80 academic year, but no information was submitted for 1978-79. However, in policy advice previously given on the Elgin College case you directed the region not to assert jurisdiction on the basis of work study funds.

d. The funding information submitted shows 1979-80 as the earliest year when GSU received Title III money. Thus GSU received no Title III funds at the time the alleged discrimination occurred. Therefore, under Title III the region would have to assert jurisdiction under GSU's future receipt of these funds.

Recommendation: Based on the above facts, we believe that under the present policy guidelines on Grove City OCR does not have jurisdiction over this complaint. Regardless of the ultimate policy decisions on Title III and work study funds, the complaint can also be properly closed, because the complainant can not be located and the region has not and can not make any substantive determination on this case. (The new IPM at II 3.22 does state that such cases should be tolled for 180 days, but since Mr. Robinson could not be located in 1981 and he has not attempted to contact the regional office since that time, we believe that this requirement has already been met.)

3. #05792102: This complaint was filed on May 25, 1979, by Bernice Sanders, who alleged discrimination on the basis of race and sex. Ms. Sanders alleged that she had been falsely accused of cheating and denied credit for one graduate course. The other black woman student involved in this incident (Lee Jefferson) received the same penalty. However, her complaint (#05802016) was closed on receipt in November 1979 as untimely filed.

Although Ms. Sanders was awarded her Masters Degree from GSU even before filing her complaint, she has never considered the matter resolved, and she has contacted the regional office a number of times over the years concerning the status of enforcement proceedings against GSU. In a telephone conversation on March 23, 1985, she again expressed her strong desire to pursue this complaint. The following is a summary of the facts of her case derived from the rather extensive documents provided by the complainant:

In the fall of 1974, Ms. Sanders began courses toward a MA degree in Human Relations Services with a specialty in School Counseling. This program was then part of the College of Human Learning and Development. (In the previous summer Ms. Sanders had been awarded an MA in Urban Teacher Education from GSU, although most of her credits had been transferred in from other colleges.)

The one allegation in Ms. Sanders' complaint arises from a course she took in the Fall 1977 term: Human Appraisal HLD 6430. This appears to have been a far more conventional graduate course than many others offered at GSU. The class was taught completely on campus one night a week by two faculty members, a white female and a white male, both of whom held the title of "University Professor." Students were required to complete a number of written assignments, and there was a final exam in December. In accordance with the GSU system, students were not assigned any grade, but they would earn three credits if they met the competencies required.

Ms. Sanders alleges that she submitted all her required assignments prior to the final exam. However, during the exam Ms. Sanders and Ms. Jefferson were forced to surrender their final exams when their professors allegedly discovered in their possession a copy of a previous final exam from this course to which they were referring. Both women were dropped from the course without credit on January 20, 1978. Ms. Sanders strongly denies that she was cheating and claims that the woman professor was intoxicated at the time.

Although Ms. Sanders did not file with OCR until May 1979, the region accepted her complaint as timely because of a number of other steps which occurred during the next year. Ms. Sanders appealed the action of her professors, and she was allowed to retake another final exam for this course in August 1978. She was then informed that she had fulfilled the competencies required for this course, but she received no academic credit. The College insisted that this lack of credit would not prevent Ms. Sanders from graduating, since she had an excess number of credits, and this course had never been in her individual degree plan. Ms. Sanders took her remaining courses in the Fall 1978 term, but the registrar denied her application for graduation in January 1979 because she lacked this course. Ms. Sanders then went through another appeal. In March 1979, a College Grievance Committee recommended that she be awarded this credit, but this recommendation was rejected by the Dean after the Committee Chairperson changed her vote. Further appeals followed, and the complainant was eventually mailed her diploma in April 1979, showing her degree had been awarded in December 1978 but with no record of her having ever been enrolled in the Human Appraisal course.

Conclusion and Recommendation: The regional staff has reviewed all the evidence in this file, including the material supposedly confiscated from her at the time of the exam. We believe it is impossible to judge the merits of Ms. Sanders' complaint without being provided access to more documentation and interviews with GSU officials. However, one of the professors involved is no longer a faculty member at GSU. Ms. Sanders' classmate has recently contacted OCR, and one other GSU complainant from this same program area is also available. Nevertheless, it may be very difficult to determine eight years later what was the class members' understanding regarding the use of study material, especially when the GSU system put so much emphasis on self-instruction.

When interviewed, Ms. Sanders stated that the only remedy she is seeking is to have her transcript amended to show that she successfully completed and earned academic credit for this additional course. Since grades were not assigned prior to Fall 1979, she presumably would not have to receive a letter grade in the course. Ms. Sanders believes that this action, even without a formal apology from the school, would restore her professional reputation for honesty. We are not sure this action would be the most appropriate remedy for this complaint, since Ms. Sanders' transcript does not reflect any punitive action taken against her. Instead, we would be more concerned with the reports of the Grievance Committee in her academic file, which could be released and which state there was "strong evidence" of cheating against her.

Ms. Sanders is also aware of the other unresolved complaints against GSU and does not think they should all be abandoned. In 1981, Ms. Sanders and a number of other students were successful in getting the Illinois State Board of Education (ISBE) to review the certification of the School Counseling and School Psychology programs at GSU. At least one public hearing was held, and GSU agreed to revise its curriculum and to reapply for certification from ISBE. However, Ms. Sanders and the other complainants do not feel that these actions dealt in any way with their discrimination complaints.

OCR's jurisdiction over this complaint can be asserted because of the following factors:

a. Records from the Administrative Proceedings show that CLD received thirteen (13) different DED grants between 1977 and 1982. (See Attached list.)

b. Since there are no academic departments at GSU, we believe that the program or activity involved in Ms. Sanders' complaint must be viewed as the entire college.

c. This interpretation is also consistent with Ms. Sanders' complaint, since the Dean of The College convened the grievance procedures which Ms. Sanders used, and the Dean initially made the decision not to award Ms. Sanders academic credit.

d. If you concur, we recommend that the region reassert jurisdiction over this complaint and notify GSU that we now intend to reactivate this investigation.

If you do not concur that this is a proper definition of the program or activity in this complaint and the DED funds involved, you may wish to consider the fact that beginning in 1979 GSU began to receive Title III grant money for the purpose of "Institution Wide Planning." Thus instead of closing this case you may wish to have it tolled pending a final policy decision on the scope of OCR's jurisdiction when an institution receives Title III funds.

4. #05792101: This complaint was filed on May 25, 1979, by Ann Ricks (now Ann Ricks Warren) who alleged discrimination on the basis of race and sex by being denied placement in a required counseling practicum.

Ms. Ricks submitted a number of documents to support her complaint. These show that in September 1978 she began an MA program in Human Relations Services with an emphasis on General Counseling. This program was offered by the College of Human Learning and Development and required students to gain practical experience at community locations rather than at schools. Ms. Ricks had already earned her B.A. in 1978 from GSU.

Ms. Ricks states that the program officials were against her from the beginning and even went so far as to falsely accuse her of sexual misconduct with the Director and several residents of a half-way house where she was working. There is no evidence in the file that these accusations were ever put in writing. There is one note from the Dean to the President that Ms. Ricks' application for a practicum placement had been "lost." The records show that the school first informed Ms. Ricks that she had not completed the prerequisite courses to be considered for a practicum placement. She later was denied such a placement after the Screening Committee failed to recommend her on the basis of taped counseling interviews which she submitted. It is impossible to weigh the merits of Ms. Ricks' complaint given the individualized degree plans then used at GSU and the general flexibility of most graduate programs.

In the next year, Ms. Ricks apparently completed all the course work for her degree except the required practicum, but she then moved to New York State. When interviewed by OCR in 1981, she verified that she still had not earned her degree. She also stated that, when back visiting Chicago in 1980, she personally visited GSU and talked with her former Program Director to inquire whether she could complete her practicum somewhere near her home. According to Ms. Ricks, this request was flatly denied.

The region attempted to contact Ms. Ricks at her last address in Rome, New York, but our letter was returned as undeliverable, and her phone there has been disconnected. The other complainants from GSU are also not aware of her present address.

Recommendation: If Ms. Ricks can not be located, the revised IPM at II 3.22 states that the case should be tolled for 180 days before closure. We agree that this requirement be followed, since Ms. Ricks was very much interested in pursuing this complaint when last interviewed in 1981. The Registrar's office at GSU also recently verified that Ms. Ricks has not been awarded a Masters degree.

If Ms. Ricks is located within the next 180 days and verifies that she still wishes to pursue her complaint, OCR's jurisdiction for this complaint is identical to that of the Sanders' case:

a. Records from the Administrative Proceedings show that CLD received thirteen (13) different DED grants between 1977 and 1982. (See Attached list.)

b. Since there are no academic departments at GSU, we believe that the program or activity involved in Ms. Sanders' complaint must be viewed as the entire college.

c. If you concur, we recommend that the region be prepared to reassert jurisdiction over this complaint and to notify GSU that we now intend to reactivate this investigation.

If you do not concur that this is a proper definition of the program or activity in this complaint and the DED funds involved, we again note the existence of Title III funds received by GSU after 1979 for "Institution Wide Planning." This may be an additional reason to toll this case for policy reasons rather than closing it completely.

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

TO : Linda A. McGovern
Acting Regional Civil Rights Director
Region V

DATE: JUN 18 1985

FROM : Harry M. Singleton
Assistant Secretary
for Civil Rights

SUBJECT: Re-evaluation of Four Denial of Access Cases Involving Governors State University -- OCR Complaint Nos. 05-80-2056, 05-79-2102, 05-79-2004, and 05-79-2101

I have reviewed your memorandum dated May 10, 1985 concerning your re-evaluation, in light of the Supreme Court's decision in Grove City College v. Bell, of the status of four complaints regarding Illinois' Governors State University (GSU), filed with the Office for Civil Rights (OCR) in 1979 and 1980. Enforcement proceedings were initiated against the Board of Governors for the Illinois State Colleges and Universities in September 1982 because of its refusal to grant OCR access to the GSU campus to investigate the facts of the four complaints. The denial of access was purportedly based upon the Board of Governors' belief that the alleged violations of Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 did not occur in programs or activities at GSU which received Department of Education (ED) funds at the time of the alleged violations. The enforcement proceedings initiated against GSU were dismissed without prejudice, on OCR's motion, effective October 6, 1983, in light of the pendency of the Grove City case before the Supreme Court. Your memorandum contained recommendations to me regarding the future disposition of each of the four cases, in light of the Supreme Court's decision in Grove City and your office's corresponding re-examination of GSU's ED funding.

Your memorandum states that "[t]he region does not have access to the recipient's Title III grant proposals." (Analysis, p. 1.) It is unclear from your memorandum, however, whether your office has sought all available information from Office of Postsecondary Education (OPE) personnel in Washington regarding GSU's use of its Title III funds. To the extent Title III funding may be relevant to any of the cases, as noted herein, you should indicate, as soon as possible, whether OCR still needs to consult OPE to obtain pertinent facts regarding GSU's Title III funding or whether all such OPE sources of information have already been exhausted.

My response to your recommendations for each of the four cases is set forth *infra*.

- Complaint No. 05-80-2056 -- Lois Bobo

  Your memorandum indicates that this complaint has been formally withdrawn and that OCR's file on the case was closed on April 19, 1985. Therefore, your memorandum seeks no action on my part with regard to this case.

- Complaint No. 05-79-2004 -- John Robinson

  Your memorandum indicates that this complaint was filed on September 28, 1978, by an undergraduate student at GSU who alleged that a professor in GSU's College of Environmental and Applied Sciences (CEAS) had misappropriated the complainant's research and then subjected him to racial slurs and "created problems for him in getting financial aid" when the complainant reported the alleged misappropriation to GSU officials. Your memorandum further indicates that CEAS does not appear to have been receiving funds under Title III or under any other Office of Education grant program in September 1978. However, your memorandum indicates that "no information was submitted" regarding CEAS' employment of College Work-Study students in the 1978-79 academic year. Finally, your memorandum indicates that OCR has been unable to locate the complainant since 1981.

  It is your recommendation that this case be closed, because OCR lacks jurisdiction and because the complainant cannot be located. The latter is an insufficient basis for closing this case. OCR does not close a case solely because the complainant is not available or is not cooperative, unless the complainant is essential to an investigation. Since the educational institution in question has denied OCR access to relevant institutional information, it is not clear that OCR possesses all the data needed to conclude that the complainant's participation is essential to the investigation.

  With regard to your conclusion that OCR lacks jurisdiction over CEAS, your analysis would appear to be consistent with OCR policy, but for the fact that the complainant alleges that a CEAS faculty member inter alia "created problems for him in getting financial aid," an allegation which could make GSU's participation in ED's student financial aid programs highly relevant to OCR's jurisdiction over this alleged act of discrimination. Under Grove City, it would clearly be prohibited for a student financial aid office at a university that receives ED student financial aid funds to discriminate in its award of such student financial aid funds. Therefore, this case should not be closed at the present time, unless it is determined either:

  (a) that the "financial aid" to which the complainant refers was not aid administered by CSU's financial aid office; or

  (b) both (i) that the complainant does not allege that the student financial aid office at GSU took any action to further CEAS' alleged attempt to interfere with the complainant's receipt of Department of Education student financial aid, and (ii) that OCR clearly lacks jurisdiction over CEAS itself, because CEAS employed no College Work-Study students and received no other Department of Education benefits during the 1978-79 academic year.

Also, your office should provide additional information regarding the relief that was originally sought by the complainant from GSU, as well as whether you believe there is any relief that GSU could possibly grant now with regard to this complaint. If there were no relief that could possibly remedy the alleged violation, that fact would strongly support your recommendation that this case be closed.

- Complaint No. 05-79-2102 -- Bernice Sanders

Your memorandum indicates that this complaint was filed on May 25, 1979, alleging discrimination on the basis of race and sex resulting from an accusation, by two professors in GSU's College of Human Learning and Development (CLD), that the complainant cheated in a December 1977 final examination in a "human appraisal" course. Though the complainant ultimately graduated from GSU without being awarded credit for the "human appraisal" course, the complainant still is interested in having academic credit awarded for this course; there are also Grievance Committee records regarding the cheating allegations that the complainant may have an interest in having expunged.

An attachment to your memorandum indicates that CLD was receiving two Department of Education grants in December 1977, one human service professional training grant and one bilingual teacher training grant. You have concluded, consistent with OCR policy, that these grants afford OCR jurisdiction over Ms. Sanders' complaint. 1/ Based on that conclusion, OCR should seek access once again to the institutional records that OCR needs to evaluate Ms. Sanders' complaint.

1/ Your memorandum indicates in a number of places that GSU does not have traditional academic departments. However, at the same time, your discussion of Ms. Sanders' complaint makes repeated reference to the CLD, the component of GSU that apparently offered the course in question in the complaint. Because OCR needs only to find jurisdiction over the CLD in order to take action with regard to this complaint, it not necessary to make the argument, as does your memorandum, that GSU's lack of traditional academic departments justifies a finding of institutionwide jurisdiction; that argument appears dubious, at best, in any event. Because your assessment of jurisdiction based upon GSU's receipt of Department of Education training grants appears to be correct, it is also not necessary to address the Title III issues that your memorandum raises with regard to Ms. Sanders' complaint.

- Complaint No. 05-79-2101 -- Ann Ricks Warren

Your memorandum indicates that this complaint was filed in May 1979, alleging discrimination on the basis of race and sex arising from events that transpired during the 1978-79 academic year, when the complainant was enrolled in a master's degree program offered by the CLD, the same College involved in Bernice Sanders' complaint, discussed above. It is your assertion that the jurisdictional issues relevant to Ms. Warren's complaint are identical to those relevant to Ms. Sanders' complaint.

However, the attachment to your analysis suggests that none of the grants received by CLD had a grant period that encompassed the 1978-79 academic year. It is also not clear whether CLD was receiving Department of Education grants in 1980, when the complainant apparently visited GSU and was refused the opportunity to complete her degree from her home in New York. It is therefore questionable whether CLD was receiving Department of Education grants during the period relevant to Ms. Warren's complaint. Further clarification in this regard should be provided by your office. 2/

Because you indicate in your memorandum that you do not believe that GSU received Title III funding prior to the 1979-80 academic year, clarification should also be provided as to why you believe that jurisdiction over this complaint might be conferred by GSU's receipt of Title III funds. If your office simply lacks information regarding whether or not GSU received Title III funds during the 1978-79 academic year, you should so indicate in a subsequent memorandum. If you can provide information indicating that GSU received Title III funding during the 1978-79 academic year or, at minimum, when GSU turned down the complainant's request to complete her degree in 1980, policy guidance will be provided regarding the extent of OCR's jurisdiction that is dictated by GSU's receipt of such Title III funding.

2/ The comments in footnote 1 above, regarding the assertion of institution-wide jurisdiction based on the training grants received by CLD prior to 1980, are equally applicable here.

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION
REGION V—CHICAGO

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Mr. Singleton
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TO Harry M. Singleton
Assistant Secretary
for Civil Rights

DATE May 10, 1985

FROM Acting Regional Director
Office for Civil Rights, Region V

SUBJECT Reevaluation of Governors State University (GSU) Denial of Access
Cases: #05802056, #05792102, #05792004, #05792101

In accordance with your Memorandum of November 2, 1984 (TAB A), the above referenced cases were authorized to be returned to the region for a reanalysis of OCR's jurisdiction in light of the Grove City decision. On December 7, 1984, the region then reassumed accountability for these cases and the companion cases from Chicago State University (CSU) after all the files and supporting Federal financial data had been reassembled and transferred to the region by the Policy and Enforcement Service.

The present four cases are the oldest of the eight still pending against the Illinois Board of Governors of State Colleges and Universities and these two of its member universities. Formal enforcement proceedings were initiated within the Department on September 10, 1982 on the basis of denial of access. The recipients' denial of access was founded on arguments that OCR had no authority to investigate because the complainants' allegations did not involve federally assisted programs or activities. In August 1983, OCR's counsel unsuccessfully moved that the administrative proceeding be stayed pending the Supreme Court's decision in the Grove City case. On September 6, 1983, on oral motion by the Department, the proceeding was dismissed without prejudice, effective October 6, 1983. On October 31, 1983, the Administrative Law Judge denied the Department's motion to withdraw its oral motion to dismiss and to set aside the order of September 6. These cases then remained in Headquarters without further action being taken until October 26, 1984, when the region recommended to you this new review.

Although the enforcement proceedings against the two universities had been consolidated, we decided it was more appropriate to submit our recommendations for each university separately. However, our review of the CSU cases has also been completed and will be submitted to you within the next two weeks.

"ENERGYWISE ECONOMIZE"

As detailed in the attachment, we have now completed the following steps regarding these GSU cases:

- We have contacted or attempted to contact all the complainants to to determine whether or not they still wish to pursue their complaints.
- We have reviewed the financial aid data (collected prior to the 1983 Administrative Proceedings) in light of your instructions of July 31, 1984, in regard to Grove City. (TAB B)
- We have prepared updated background information on GSU including DED funding.
- We have provided recommendations on each case for your consideration and approval.

If your staff have need of clarification, they may contact Dr. Mary Frances O'Shea, Director, Postsecondary Education Division, at 8-353-3865.

Thank you for your consideration of this matter.

Linda A. Cornel
Linda A. Cornelius

Attachment

Mr. Singleton

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION
REGION V—CHICAGO

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Enforcement

TO Harry M. Singleton
Assistant Secretary
for Civil Rights

DATE May 16, 1985

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FROM Acting Regional Director
Office for Civil Rights, Region V

85-1959
285

SUBJECT Reevaluation of Chicago State University (CSU) Denial of Access Cases: #05812004, #05812088, #05812091, #05822026

- not attached (CCU)

In accordance with your Memorandum of November 2, 1984 (TAB A), the above referenced cases were authorized to be returned to the region for a reanalysis of OCR's jurisdiction in light of the Grove City decision. On December 7, 1984, the region then reassumed accountability for these four cases and the four companion cases from Governors State University (GSU) after all the files and supporting Federal financial data had been reassembled and transferred to the region by the Policy and Enforcement Service.

The present four cases against Chicago State University are four of the eight cases still pending against the Illinois Board of Governors of State Colleges and Universities and Governors State University and Chicago State University. Formal enforcement proceedings were initiated within the Department on September 10, 1982 on the basis of denial of access. The recipients' denial of access was founded on arguments that OCR had no authority to investigate because the complainants' allegations did not involve federally assisted programs or activities. In August 1983, OCR's counsel unsuccessfully moved that the administrative proceeding be stayed pending the Supreme Court's decision in the Grove City case. On September 6, 1983, on oral motion by the Department, the proceeding was dismissed without prejudice, effective October 6, 1983. On October 31, 1983, the Administrative Law Judge denied the Department's motion to withdraw its oral motion to dismiss and to set aside the order of September 6. These cases then remained in Headquarters without further action being taken until October 26, 1984, when the region recommended to you this new review.

Although the enforcement proceedings against the two universities--Governors State University and Chicago State University--had been consolidated, we decided it was more appropriate to submit our recommendations for each university separately. For this reason the region submitted its recommendations to you on Governors State University on May 10, 1985.

556

Called region for attachments. Received attachments in CCU on 5/22 ✓

"ENERGYWISE ECONOMIZE"

As detailed in the attachment, we have now completed the following steps regarding these CSU cases:

- + We have contacted all the complainants to determine whether or not they still wish to pursue their complaints.
- + We have reviewed the financial aid data (collected prior to the 1983 Administrative Proceedings) in light of your instructions of July 31, 1984, in regard to Grove City. (TAB B)
- + We have provided updated background information on CSU including DED funding.
- + We have provided recommendations on each case for your consideration and approval.

If your staff have need of clarification, they may contact Dr. Mary Frances O'Shea, Director, Postsecondary Education Division, at 8-353-3865.

Thank you for your consideration of this matter.

Linda A Cornelius
Linda A. Cornelius

Attachments

Chicago State University Reevaluation

A. Background on Recipient: Chicago State University (CSU) is one of the five state universities in Illinois responsible to the Board of Governors of State Colleges and Universities. The previous enforcement actions initiated by the region and approved by Headquarters included the Board itself, since there was reason to believe that CSU received some flow through funds from the Board. However, the Board is not now listed as a recipient in the CASPER system.

Chicago State University offers baccalaurate degrees in various majors and has a number of graduate programs at the Masters level. Unlike Governors State University, CSU has always had a traditional system of governance and a regular grading system. In this new review we did not note any reorganization of departments at CSU which might now affect our jurisdiction. Since 1982 we also have not received any more current HEGIS data on the university. In particular we have no way of determining whether the number of Hispanic students at CSU has increased from the 148 or 2% reported in 1982. (The failure of CSU to recruit and to provide services for Hispanics is one of the class allegations made in two of these complaints.)

1. DED Funds: According to information available on the CASPER system, CSU participates in DED student financial assistance programs as follows:

	Awarded	Amount
Supplemental Educational Opportunity Grants	7-01-84	$ 151,073
College Work Study	7-01-84	$ 524,904
Pell Grants	1-26-84	$ 1,742,278

The only other active DED funds of record received for 1984-85 were:

Veterans Cost of Instruction Program (38 USC §246)	6-22-84	$ 2,535
Upward Bound (20 USC §1068)	2-29-84	$ 221,299
Special Services for Disadvantaged Students (20 USC §1070d *et seq.*)	5-31-84	$ 105,000

In the financial aid information supplied for the 1983 Administrative Proceedings, we located grant applications for these last two programs from previous years. The Upward Bound program is a precollegiate summer instructional program designed for disadvantaged students, who may or may not plan to enroll at CSU. The Special Services grant helps support a tutorial program open to all CSU students in academic difficulty. Both programs are in the Division of Student Development under the direction of its Dean. Therefore, OCR may have jurisdiction over the components of this program: Career Planning and Placement, Counseling, Student Health Services, Student Activities, Intercollegiate Athletics, and Special Services.

According to the CASPER system CSU does not now receive any Title III grant money for Strengthening Developing Institutions. The last such grant seems to have been received in the 1981-82 academic year, where the funds were widely distributed among CSU's colleges. The Title III funds are cited later in this report. However, we note that in Policy Guidance recently supplied to the region on another case (Elgin Community College, #05842063), you stated that Headquarters had not yet determined whether or not Title III funds convey jurisdiction over the entire institution.

In addition to the information available on the CASPER system, the Region inquired whether or not CSU had received any DED Construction grants when the new campus was built. DED officials in Washington confirmed that CSU had received one grant for this purpose as follows: Project 5-5007-12 is a General Instructional Award dating from 1972, which will run for twenty-five years or until 1997 at $29,935 per year. This grant pays the interest above 3% on the bonds issued by the State of Illinois to pay for the construction of one building on campus-Classroom Triad B. According to the 1982 CSU Catalog, this building contains the offices of the departments of Accounting and Finance, Art, Dietetics, Management, Marketing and Information Systems, Medical Record Administration, Nursing, and Radiation Therapy Technology.

Prior to the 1983 Administrative Proceeding, complete Federal financial assistance data on CSU was provided for the years 1977 through 1982. The region has reviewed all this information, and in our analysis of each complaint below we have identified the DED funds which may have a direct bearing on OCR's jurisdiction.

2. Organization of the University: The University is divided into five colleges with clearly defined departments:

College of Allied Health
College of Arts and Sciences
College of Business Administration
College of Education
College of Nursing

The individual allegations of discrimination in these complaints concern departments in the Arts and Sciences and Education. However, two of the complainants have also made allegations regarding such areas as Special Services and Recruiting.

3. Compliance Activity since *Grove City*: The University continues to be represented by the Counsel for the Illinois Board of Governors. No complaints have been filed against CSU since the *Grove City* decision was rendered. In fact, since this time the region has received only one complaint from any of the five affiliated universities. This was a Title VI and Title IX employment case against Governors State University where Counsel did provide all the information requested in a timely manner. However, since this case was already being resolved internally, it is impossible to determine whether Counsel intends to challenge OCR in the future based on *Grove City.*

B. Disposition of Complaints

1. #05812004: This complaint was filed on August 8, 1980, by Louis Hoggatt who alleged that CSU had retaliated against him for having previously filed a complaint with this office. Mr. Hoggatt specifically alleged that he was being required to complete additional courses to be awarded his Bachelors and Masters degrees in Occupational Education. Mr. Hoggatt's previous complaint, filed on the basis of race, involved only denial of his Masters degree. A no cause Letter of Findings was issued on August 9, 1976.

   Mr. Hoggatt has repeatedly alleged that he has been harassed and discriminated against by CSU for the last twenty years and that he has tried to resolve his complaint internally over sixty times. In 1961 CSU was a predominantly white institution known as Chicago Teachers College South when Mr. Hoggatt first enrolled there in an Industrial Education baccalaureate program. He continued to take courses at CSU with generally good grades until 1964 but then returned to Western Michigan University (WMU), which awarded him a B.S. degree in 1965, based partly on credits earned at CSU and elsewhere. In fact, Mr. Hoggatt claims that he has earned 180 semester hours of undergraduate credit, and, therefore, should be able to claim two bachelors degrees.

   Mr. Hoggatt returned to CSU to pursue a Masters degree in the same department but failed to earn his degree in 1968 after failing the comprehensive exams three times. OCR's investigation showed that he was the only student allowed to take this exam more than twice and that he had disregarded the Department's advice to audit two courses before attempting this exam the third time. Contrary to the complainant's allegation, OCR also determined that this exam was not the final requirement for his degree, since he also had to write and defend a Masters thesis.

   Mr. Hoggatt alleged that his exams were not graded fairly. However, he did not file with OCR until 1971, and the region did not complete its investigation until 1976. By this time CSU had revised its requirements for its Masters Program. Supported by OCR's findings, CSU has consistently held that it has no obligation to award Mr.

Hoggatt his Masters degree, with or without a reexamination. The region has never had the opportunity to determine CSU's position on granting Mr. Hoggatt a Bachelors degree, and there is no reliable information in the college catalogs on the requirements for earning a second Bachelors degree at CSU. In 1980 the region accepted Mr. Hoggatt's complaint as timely filed, since he had recently applied for readmission to CSU in order to have his "new" credentials evaluated.

Mr. Hoggatt was contacted recently and confirmed again that he wishes to pursue his complaint. Mr. Hoggatt has apparently not taught or worked in the field of industrial education for many years. Instead, he subsequently earned a Masters in Public Administration elsewhere and has since held a number of high level positions in several Federal agencies. Since Mr. Hoggatt has never been awarded either a Bachelors or a Masters from CSU, his complaint can not be considered moot. Mr. Hoggatt is not willing to reenroll in CSU, however briefly, to attain his degrees under the existing requirements, and he claims that even this offer has been withdrawn. Instead, he is demanding that CSU officials award him both degrees, thereby admitting that twenty years ago CSU was hostile to black students and many like himself were driven away.

Recommendation: We recommend that OCR attempt to initiate an investigation of Mr. Hoggatt's allegations regarding both disputed degrees. Such an investigation could be closely restricted to actions taken against Mr. Hoggatt in 1980. As described below, OCR's jurisdiction is supportable because of the DED funds involved in this program or activity. If this is to be considered an admissions complaint, OCR might also be construed to have institution wide jurisdiction.

In regard to this proposed investigation, the region would not have the obligation to attempt to reinvestigate the circumstances surrounding the denial of Mr. Hoggatt's Masters degree in 1968. However, we can properly investigate how CSU responded to Mr. Hoggatt's demands for his degrees and applications for readmission in 1980, whether or not he had new credentials, whether the requirements had changed, and whether or not Mr. Hoggatt was treated contrary to general policy because of his past complaint. It is impossible to make these determinations without information from CSU. For example, we need to know whether Mr. Hoggatt's record should have been reviewed by both the Office of Evaluation and the Department of Occupational Education.

The 1980-81 CSU Catalog shows the Department of Occupational Education as part of the College of Education offering degrees in three areas of specialty: Industrial Arts Education, Vocational-Technical Education, and Industrial Technology.

At the time Mr. Hoggatt filed his complaint, The Department of Occupational Education received one grant directly from HEW:

#80-33 Vocational Education Teacher Certification Program
(9/1/79-8/31/80) $9,590

In addition, the financial aid information from the 1983 Administrative Proceedings also show that between 1980 and 1982 the College of Education or individual departments within the College such as Special Education or Curriculum and Instruction received six additional DED grants.

In regard to current funding, we would also note that CSU is one of the eight universities in Illinois which train vocational educational teachers and which are eligible to receive funds under the Vocational Education Act through the designated state recipient. The region is currently attempting to determine the funds CSU may be receiving for this purpose.

On the basis of this financial assistance information, we believe that OCR does have jurisdiction over this complaint even under a narrow reading of Grove City and that the region could notify CSU that we are reactivating our investigation on this basis.

2. #05812091: This complaint was filed on June 11, 1981 by Maria C. Arcay, who alleged discrimination on the basis of national origin. A native of Puerto Rico, Ms. Arcay completed two years at Puerto Rico Junior College and first enrolled at CSU in January 1978. At the time of filing this complaint, Ms. Arcay was pursuing a bachelors degree in Secondary Education-Spanish. Ms. Arcay is the wife of Dr. Hernandez-Nieto, Chairman of the Modern Language Department, and one of the other CSU complainants (#05812088).

Ms. Arcay's complaint contains allegations of individual and class discrimination, supported by a twenty-five page typed statement and copies of documents from her academic file and correspondence from various CSU officials. The Counsel for CSU denied access to the region to investigate this complaint at the intake stage, contending that the complaint involved only Arcay's student teaching, a program that he claimed received no Federal funds. Therefore, there was no Investigative Plan developed for this case prior to its referral for enforcement.

Ms. Arcay was recently contacted to determine whether or not she wished to pursue her complaint. She confirmed that after 1982 she left CSU to attend Governors State University. She originally wanted to complete the same program she had been pursuing in Education, but after learning how many courses she needed to take, she decided to complete a Bachelors in Intercultural Studies. She now is completing a Masters degree at Governors State in Bilingual Special Education for Learning Disabled Students. Ms. Arcay stated that she does not wish to withdraw either this complaint or her retaliation complaint. She still thinks that CSU should modify her transcripts, that her allegations of class discrimination against Hispanics are still valid, and that OCR should investigate her dismissal in 1978. Ms. Arcay was advised, however, that her allegations may not have all been timely filed.

Ms. Arcay's complaint alleged that CSU discriminated against her every year from 1978 to 1981. As described below Ms. Arcay does begin with events in 1978, but they are individual allegations of discrimination and do not constitute "continuing discrimination."

a. Ms. Arcay alleges that CSU discriminated against her when she was dismissed for poor scholarship at the end of the Summer 1978 term and CSU later refused to have this action stricken from her transcript.

   Recommendation: This allegation can not be considered timely filed, and the issue is moot since Ms. Arcay was readmitted effective the winter 1979 term.

b. Ms. Arcay further alleges that she was given "misleading advising" during the semester she was on probation prior to her dismissal in 1978.

   Recommendation: This allegation is also untimely and should not be investigated by OCR.

c. Ms. Arcay alleges that she did not receive proper transfer credit for courses taken in Puerto Rico and she had to repeat many of them at CSU. She also alleges that CSU should have removed a grade from her transcript which she received in a Psychology course after it agreed to accept credit for an equivalent course from her college in Puerto Rico.

   Recommendation: When interviewed recently, Ms. Arcay stated that the only problem which had never been resolved in this area was her required Psychology course. In the Spring 1980 term she took Psychology 204 at CSU and received an Incomplete at the end of the term. She made no effort to complete her work, because she was trying to get Admissions to accept as a substitute an "equivalent" course from her college in Puerto Rico. CSU accepted this course for credit only and still insisted she needed to complete Psychology 204. Ms. Arcay filed an internal grievance on this insisting she should be able to withdraw from Psychology 204 and have this other course fulfill the requirement. Ms. Arcay's requests were denied, and the I grade eventually reverted to an F. Documents submitted show that she received her final answer on her grievance from the Vice President on December 5, 1980. According to the IPM she was then required to file with OCR within sixty days. However, since she did not file until June 1981, this allegation is also untimely, and should not be investigated by OCR.

d. Ms. Arcay alleges that she and other Hispanic students have been denied the English as a Second Language tutoring needed for them to pass the English Qualifying Examination.

Recommendation: Although this examination is required for all undergraduate students, CSU might have the obligation under Title VI to provide such services in order to provide equal educational opportunity to Hispanic and other non-native speakers. Since Ms. Arcay believes this is still a problem at CSU, OCR should pursue this allegation.

e. Ms. Arcay finally alleges that the form and content of the English Qualifying Examination itself discriminates against Hispanic and other non-native speakers and that CSU has allowed students whose primary language is English to take courses at the upper level before they have passed this requirement.

Recommendation: We believe the region requires your policy advice on the first part of this allegation, particularly whether the region should investigate the validity of this testing instrument. We could investigate discrimination by CSU officials in waiving this requirement, but this would entail asserting institution wide jurisdiction. This approach is possible, since students must pass this test before applying for admission into all the upper level colleges within the University.

Overall Recommendation: In regard to Ms. Arcay's three untimely allegations of individual discrimination (#a, #b, and #c), the region will now provide her the opportunity to request a waiver of the 180 day time limit for filing. This action was not taken in 1981 due to the outstanding denial of access issue. At this time we do not foresee any acceptable reasons for granting such a waiver, but we will not close this portion of her complaint pending further directions from you.

In regard to the class allegations, we believe OCR does have jurisdiction over #d, since the Division of Student Development continues to receive a DED Special Services Grant for tutoring disadvantaged students. According to the Federal financial information from the 1983 Administrative Proceedings, the Office for Academic Affairs, which includes Student Development, received the following grants from DED or its predecessor, HEW's Office of Education:

#82-32- Special Services Program- $98,568 (9/1/82-8/31/83)

#81-30 Strengthening Developing Institutions Programs
$350,000 (7/1/81-6/30/82)

#81-32 Special Services for Disadvantaged Students
$102,676 (9/1/81-8/31/82)

#80-58 Special Services for Disadvantaged Students
$98,727 (9/1/80-8/31/81)

In regard to allegation #e, the region could probably not assert institution wide coverage when the complaint was filed, since Education was the only one of the five colleges which received DED funds during the period as follows:

#82-45 Project Upward Bound $198,458 (7/1/82-6/30/83)

#82-27 Bilingual-Bicultural Education Program $99,375 (8/1/82-7/31/83)

#81-37 Bilingual-Bicultural Training Program $121,403 (8/1/81-7/31/82)

Based on these funds, the region could restrict its investigation to students taking the Qualifying Examination who wished to take Education courses or wished admission into the College of Education. However, since the region's information on present funding is limited to the CASPER reports, we are not able to verify that even this one College within the University is still receiving DED funds. Therefore, the region can not make any recommendation concerning this portion of Ms. Arcay's complaint without further funding information as well as policy advice.

3. #05822026: This complaint was filed on February 2, 1982 by Maria Arcay and alleged that she had been retaliated against for having filed a previous complaint with OCR (#05812091). She specifically alleged that when she applied for a student teaching placement in October 1981, she was not only turned down but treated in an abusive manner by the responsible Director in the College of Education. She also alleges that this treatment stemmed from instructions from CSU's Vice President for Academic Affairs to all staff that her academic activities be closely monitored. As evidence for this Ms. Arcay cites the Vice President's report to her on December 5, 1980, denying her grievance and suggesting her work will be monitored in the future.

The documents submitted by Ms. Arcay show that she specifically applied for student teaching without having passed the English Qualifying Examination. The CSU catalogs clearly state that a student can not be admitted to the College of Education until he or she has passed both the English and Mathematics Qualifying examinations nor are they authorized to take any professional level courses including student teaching. However, Ms. Arcay alleges that this requirement had often been waived for white students, and this allegation was part of her original complaint.

According to Ms. Arcay's account, this requirement was never cited when her application was denied in November 1981, but the Director of Field Placement simply told her that she was too unstable and lacking in morals to ever be a teacher.

Since the alleged retaliation occurred in November 1981 and this complaint was filed in February 1982, it was timely filed. When interviewed recently, Ms. Arcay also stated that she does not wish to withdraw, and she would be willing to return to CSU to gain certification in Secondary School Spanish.

Recommendation: The Division investigated what was the program or activity involved in this complaint and whether DED funds were involved. The CSU Catalog shows that there is no Department of Student Teaching within the College of Education, only a Director of Field Placement, and that all faculty members in the individual departments within the college could act as advisors. Therefore, we believe that the appropriate program or activity in this complaint is the entire College. For this reason the college wide DED grants cited for Ms. Arcay's original complaint also confer jurisdiction for her allegations of retaliation. We also believe that it is significant that the College was receiving DED funds for the training of Bilingual teachers in Spanish, and Ms. Arcay was applying to qualify as a secondary level Spanish teacher.

In regard to the merits of this complaint, we doubt whether even the basic elements of proving a prima facie case of retaliation complaint can be met in this case. Ms. Arcay's original complaint against CSU was not investigated, and the only contact made with CSU officials was a Letter of Acknowledgement sent to to the President on June 6, 1981 which did not include her name. The Board of Governors Attorney then personally contacted the region for details on this complaint and immediately denied access. The Vice President's warning letter to Ms. Arcay was sent on December 5, 1980, and officially concluded her internal grievance procedures -before her *original* complaint was even filed.

The region's Litigation Memorandum of April 26, 1982 took the position that OCR had jurisdiction over the alleged retaliation both on the basis of her internal grievance (which included allegations of national origin discrimination) as well as on the basis of her previous OCR complaint. However, both events are far removed in time from the alleged retaliation, and it would be very difficult to show that the official in the College of Education knew about either matter.

Despite these impediments to any investigation, we conclude that OCR did have jurisdiction over this complaint at the time it was filed even under a narrow interpretation of *Grove City*, and we could inform CSU we are reactivating this investigation. However, as noted above, we are not certain whether the College of Education is now receiving or administering any DED funds.

4. #05812088: This complaint was filed on June 1, 1981 by Hector Hernandez-Nieto, who alleged that CSU had discriminated against him on the basis of his national origin in his role as a professor and administrator. He also alleged that CSU was discriminating against Hispanic employees and students. At the time of filing his complaint, Dr. Nieto was a tenured Associate Professor and Chairperson of the Modern Language Department. He also had served as Special Assistant for Hispanic Affairs to the Vice President for Academic Affairs.

   a. In regard to his individual complaint, Dr. Nieto alleged that because of his national origin, his promotion to full professor had been delayed, that he was given a low performance evaluation, and that his salary was kept lower than other department chairpersons. The region declined to include any of these allegations in our 1982 enforcement recommendations to Headquarters because of OCR's limited jurisdiction over employment under Title VI and because Dr. Nieto had simultaneously filed this complaint with EEOC.

   Recommendation: When interviewed recently, Dr. Nieto stated that he had been promoted to Full Professor about two years ago and that at that time he had decided not to seek reelection as Chairperson. Therefore, he is no longer receiving annual evaluations from the Dean. He admits that his salary is now comparable to other similarly situated Full Professors at the University. However, he still feels that CSU should compensate him for the years he was underpaid. Based on this conversation Dr. Nieto's complaint appears to be moot except for the issue of back pay.

   The Division also recently contacted EEOC regarding the disposition of Dr. Nieto's complaint, and we received a copy of the Letter of Determination and the attached Right to Sue letter issued to him on November 30, 1983. Dr. Nieto confirmed he had received this report and appealed EEOC's findings to Washington. However, when these findings were confirmed, he decided not to sue the university.

   EEOC's Letter of Determination states in part:

   > The Charging Party alleged that Respondent discriminated against him unfavorably and [sic] denying him a merit increase, promotion to full Professor and not giving him the support that is given to non-Hispanics because of his national origin, Mexican. Examination of the evidence in the record indicates that there is not reasonable cause to believe that this allegation is true. . . .

This document shows that EEOC made findings on each of the individual allegations of discrimination which Dr. Nieto filed with OCR. The region also requested to examine EEOC's entire investigative file, but it had been destroyed within one year in accordance with agency guidelines. However, based on these facts, the region would still recommend that this portion of Dr. Nieto's complaint be closed in accordance with the IPM at I 2.26. as a deferral to the findings of another agency.

b. Dr. Nieto alleged that CSU was failing to recruit and hire Hispanic faculty and staff, including, civil service staff. He also alleged that Hispanic faculty were being denied promotion and tenure as a class on the basis of national origin. Dr. Nieto also provided a list of other Hispanics allegedly let go in the past, but none of these cases would have been timely filed. In April 1982, after this case had already been referred for enforcement, Maria Arcay attempted to file a complaint on behalf of a Hispanic Professor at CSU, Leonel Campos, who had just been denied tenure in the Department of Corrections. The region consolidated this new complaint into this class issue. However, Mr. Campos chose not to file a complaint when the region wrote to him expaining his rights to do so.

Our review of EEOC's Letter of Determination cited above showed that these class issues have not been investigated by EEOC.

Recommendation: As noted above, Dr. Nieto still believes that this problem of discrimination exists at CSU. In April and May our regional staff requested a copy of CSU's latest EEO-6 report from Headquarters, but we have not yet received this information. However, it is our impression from unofficial documents and from the CSU catalogs that CSU probably has a better than average record of employing Hispanic faculty and administrators at all levels. If a more careful analysis shows that there is no evidence that there is a pattern and practice of discrimination, then we recommend that the region not attempt to conduct a complete investigation of this allegation. We assume that this is still the proper threshold analysis to be conducted to determine OCR's jurisdiction over employment complaints filed under Title VI.

c. Finally Dr. Nieto alleged that CSU discriminated against Hispanic students in admissions, in the failure to provide adequate tutoring especially for the English Qualifying Examination, and in its inconsistent enforcement of this exam as a prerequisite for upper level study.

Recommendation: As noted above, all of the student services issues raised by Dr. Nieto are contained in complaint #05812091, and OCR's jurisdiction is supported at least in part by the available Federal funding information. If you concur that the region should not attempt to investigate any of Dr. Nieto's allegations of individual or class discrimination in employment, we would then recommend that his entire complaint be closed and the remaining student services issues be consolidated into complaint #05812091. We realize that the IPM at I 1.34 specifies that in the case of multiple complainants filing the same charges the earliest complaint should be retained, but in this case both complaints were filed at almost the same time. However, until you have responded to these recommendations, the region will not take any further action on any part of Dr. Nieto's complaint except to attempt to review any available EEO data on CSU.

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

DATE: OCT 25 1985

TO : Linda A. McGovern
Acting Regional Civil Rights Director
Region V

FROM : Harry M. Singleton
Assistant Secretary
for Civil Rights

SUBJECT: Re-evaluation of Four Denial of Access Cases Involving Chicago State University -- OCR Complaint Nos. 05-81-2004, 05-81-2088, 05-81-2091 and 05-82-2026

I have reviewed your memorandum dated May 16, 1985, concerning your re-evaluation, in light of the Supreme Court's decision in Grove City College v. Bell, of the status of four complaints regarding Chicago State University (CSU), filed with the Office for Civil Rights (OCR) in 1980, 1981 and 1982. Enforcement proceedings were initiated against the Board of Governors for the Illinois State Colleges and Universities and CSU in September 1982, because of CSU's refusal to grant OCR access to the CSU campus to investigate the facts of the four complaints. The denial of access was purportedly based upon a belief that the alleged violations of Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 did not occur in programs or activities at CSU which received Department of Education (ED) funds at the time of the alleged violations. The enforcement proceedings initiated against CSU were dismissed without prejudice, on OCR's motion, effective October 6, 1983, in light of the pendency of the Grove City case before the Supreme Court. Your memorandum contained recommendations regarding the future deposition of each of the four cases, in light of the Supreme Court's decision in Grove City and your office's corresponding re-examination of CSU's ED funding.

My response to your recommendations for each of the four cases is set forth below.

- Complaint No. 05-81-2004 -- Louis Hoggatt

Your memorandum indicates that this complaint was filed in August 1980 by a former student at CSU who "reapplied for admission" in 1980, apparently for the sole purpose of renewing a past dispute with CSU regarding CSU's refusal to award the complainant a master's degree. The previous dispute was the subject matter of a complaint that the complainant filed with OCR in 1971, a complaint with respect to which OCR issued a "no cause" letter of findings in 1976. Your memorandum indicates that the complainant now believes that he is entitled to both an undergraduate and graduate degree from CSU, both of which CSU believes he had insufficient credits to have earned as a result of his matriculation at CSU during the 1960s and early 1970s. The complainant -- who, according to your memorandum, is unwilling to re-enroll at CSU under any circumstances, despite his purported "reapplication" -- alleges in his 1980 complaint that CSU is retaliating against him for having filed his 1971 complaint with OCR, by requiring him to take additional courses in order to earn the degrees he believes he has already earned at CSU.

In light of the facts summarized above, further examination is appropriate regarding your memorandum's suggestions that OCR (1) should treat the complainant's 1980 grievance as the admissions case it purports to be; and (2) should consider, based solely on the facts set forth above, whether the complaint presents a suitable situation for the application of the "admissions exception" to the Grove City decision. In light of your memorandum's indication that the complainant in fact had no intention to enroll at CSU when he "reapplied" in 1980, it is difficult to see how the 1980 complaint constitutes anything other than a mechanism for rearguing the issues raised in the complainant's 1971 complaint, especially with regard to his graduate degree grievance. With regard to the complainant's undergraduate degree grievance, it is unclear why OCR should accord any significance to the complainant's "reapplication" to CSU, if it is clear that the complainant already believed he had earned enough credits for that degree when he submitted his "reapplication" and if it is clear that the complainant had no actual intention to enroll at CSU upon "reapplying."

Therefore, unless the preceding comments misinterpret statements contained in your memorandum, or unless further evidence can be provided that would dictate a different disposition, you should dismiss this complaint as not timely filed. At most, at this point OCR should conduct a jurisdictional investigation only, to determine whether the complainant had notice, prior to his 1980 "reapplication," of CSU's position regarding the undergraduate degree he now seeks. If the complainant had such notice, the complaint should be time-barred. If the complainant did not have such notice, OCR -- to the extent it has jurisdiction over the relevant program or activity at CSU, as discussed below -- should investigate solely whether CSU refused to acknowledge the complainant's entitlement to an undergraduate degree in 1980 because the complainant had filed an OCR complaint against CSU in 1971.

Consistent with the above, in making its determination of jurisdiction over the relevant program or activity for purposes of this complaint, OCR should not consider invoking the "admissions exception" to Grove City unless the complainant actually sought to enroll at CSU in 1980. If the complainant sought to enroll as an undergraduate, presumably the complainant's dispute can be viewed as one either with the University itself, with the College of Arts and Sciences, or with the College of Education -- whichever entity determines undergraduate admission to the program in question. If the complainant did not seek to enroll as an undergraduate, however, the complainant can at best be viewed as having demanded in 1980 that he be issued a Bachelor of Science degree in Industrial Education from CSU, a dispute that presumably concerns the segment of the University that awards undergraduate degrees in industrial education.

Though your memorandum discusses the ED funds received in 1980 by the College of Education's Department of Occupational Education, it is unclear from your memorandum whether you have determined that the Department of Occupational Education in fact awards the University's undergraduate degrees in industrial education; those degrees might instead be awarded, for example, by CSU's College of Arts and Sciences. Therefore, in addition to the information indicated above that must be provided in order to properly determine the timeliness of Mr. Hoggatt's complaint, further information must be provided in order to determine:

(1) whether the Department of Occupational Education -- over which OCR appears to have jurisdiction -- is indeed the relevant administrative component of CSU for purposes of determining, in light of Grove City, OCR's jurisdiction over this complaint; and

(2) whether OCR has jurisdiction, in light of Grove City, over the relevant administrative component of the university, if the Department of Occupational Education is not that component.

- Complaint Nos. 05-81-2091 and 05-82-2026 -- "Maria Arcay I" and "Maria Arcay II"

According to your memorandum, the first of these two complaints ("Maria Arcay I"), filed in 1981, alleges that CSU discriminated on the basis of national origin both against the complainant as an individual and against Hispanic students as a class. The complainant's individual grievances primarily concern her dismissal from CSU in 1978, grievances which your memorandum concludes, in accordance with OCR policy, were not filed on a timely basis; the complainant should be advised accordingly in this regard.

In contrast, the complainant's class-based grievances in "Maria Arcay I" do appear to have been filed on a timely basis, and they are closely related to the grievances raised in another complaint ("Maria Arcay II") filed by Ms. Arcay with OCR in 1982. To facilitate analysis of Ms. Arcay's allegations in this regard, the discussion of the class-based allegations of Ms. Arcay's 1981 complaint has been combined with the discussion of Ms. Arcay's 1982 complaint below.

Ms. Arcay's 1982 complaint primarily focuses upon CSU's requirement that a student pass qualifying examinations in English and mathematics in order to be admitted to its upper-level colleges or to take any professional level courses. Your memorandum indicates that the complainant applied to the College of Education for a student teaching placement in October 1981, but was denied such a placement in November 1981. The complainant alleges that the actual, unstated reason that she was denied a placement was that she had filed the complaint discussed in the preceding paragraphs ("Arcay I") against CSU. It is also clear, however, that Ms. Arcay had not passed the

English qualifying examination when she applied for her student teaching placement, a fact consistent with the class-based allegations of "Arcay I", which assert that, in general:

(a) the form and content of the English qualifying examination discriminate against Hispanic students and other students whose primary language is not English;

(b) CSU discriminates against students whose primary language is not English by allowing certain students whose primary language is English to take upper-level courses without having passed the English qualifying examination; and

(c) CSU discriminates against students whose primary language is not English by failing to give those students special tutoring to help them pass the examination.

With regard to Ms. Arcay's class-based allegations, your memorandum discusses a number of grants received by CSU's College of Education, concluding that, except with regard to allegation (c) above, further funding information is needed in order to evaluate OCR's jurisdiction over that component of CSU, as well as over other components of CSU. However, there are two issues to which your memorandum makes only brief reference that would appear to be of central significance to OCR's jurisdiction over Ms. Arcay's class-based allegations.

First, although your memorandum indicates that "the Division of Student Development continues to receive a DED Special Services Grant for tutoring disadvantaged students" and indicates that therefore "we believe OCR does have jurisdiction over" allegation (c) in the above list, your memorandum fails to indicate whether the Special Services grants that the Division of Student Development has received and continues to receive could serve as a basis for asserting jurisdiction over any of Ms. Arcay's other class-based allegations. Also, in this regard, it has been my understanding, as is reflected in the the September 16, 1983 Order of Administrative Law Judge Richard J. Murphy regarding CSU, that CSU expressly gave OCR access to its campus two years ago to investigate at least allegation (c) in the above list, based on the Special Services funding. Therefore, jurisdiction over allegation (c) has not been in question since 1983, and your office should not delay investigation of that allegation any further.

Second, your memorandum makes only passing reference to the possibility of applying to this situation the "admissions exception" to the Grove City decision. Therefore, your office should re-evaluate Ms. Arcay's allegations in light of OCR's policies regarding the "admissions exception" and should submit its analysis as to its applicability here. Your office also should search further for the missing funding information to which your memorandum refers and should submit an analysis of that information.

To the extent that Ms. Arcay's 1982 complaint ("Arcay II") alleges an independent claim to the effect that the College of Education retaliated against her because of her filing of the 1981 complaint, your memorandum appears to analyze certain jurisdictional facts regarding that claim in accordance with OCR policy. For example, because there is no component of the College of Education that is responsible for all student teaching, and because each faculty member of the College of Education can act as an advisor for a student teacher, the relevant component of CSU for jurisdictional purposes does appear to be the College of Education itself.

However, your memorandum does not indicate that the College of Education was a recipient of any ED funds that were granted for general College-wide purposes -- it appears from your memorandum that the College of Education received only grants to be used for particular programs carried on within certain smaller components of the College. Though it is true that Ms. Arcay does allege retaliation by an official of the Office of Academic Affairs, one of the smaller components of the College that did receive ED funds, it is not clear that the retaliation which Ms. Arcay alleges was perpetrated by the Director for student teacher placement similarly occurred within a segment of the College that received ED funds. Therefore, your recommendation that OCR renew its investigation with regard to Ms. Arcay's retaliation claim appears to be well founded to the extent that her claim is directed to the Office of Academic Affairs, but, to the extent that her claim is directed to the Director for student teacher placement, it is not clear that jurisdiction exists, given the facts presented in your memorandum.

- Complaint No. 05-81-2088 -- Hector Hernandez-Nieto

Your memorandum indicates that the complainant in this case has filed three grievances concerning three fairly discrete circumstances -- one involving only himself, and two others alleging class-based discrimination against Hispanics other than or in addition to himself. The complainant's three grievances are therefore addressed separately below, in the order in which they are addressed in your memorandum.

The complainant's first grievance alleges that his promotion from Associate Professor to Professor in CSU's Modern Language Department was delayed for reasons related to his national origin. At the same time that the complainant filed his complaint with OCR, however, the complainant filed an identical grievance with the Equal Employment Opportunity Commission (EEOC), causing OCR to forego its investigation of the complaint. On November 30, 1983, according to your memorandum, EEOC issued its letter of determination regarding the complainant's grievance, which indicated that the complainant's allegations of discrimination could not be substantiated. Your memorandum indicates that little more regarding EEOC's handling of the complainant's grievance is known by your office, because EEOC had destroyed its investigative file prior to receiving OCR's request to examine it.

Despite the fact that your office has not been able to examine EEOC's investigative file regarding this grievance, it is your recommendation that this portion of Mr. Hernandez-Nieto's complaint be closed, in deference to EEOC's investigatory findings. It is not clear, however, that your recommendation is in accordance with OCR policy, as expressed in the revised 1984 Investigation Procedures Manual (IPM). IPM Sections I-2.26 and I-4.2 indicate that OCR will close a complaint in deference to the findings of another agency only if OCR determines that *inter alia* "all of the allegations made in the OCR complaint were included in *the other* agency's investigation" and "findings that are legally sufficient under OCR standards were made on each of those allegations." It is unclear how your office could determine that EEOC's investigation and findings met OCR's criteria in these respects if it did not have access to EEOC's investigatory file. If you contend nevertheless that your recommendation regarding this aspect of Mr. Hernandez-Nieto's complaint should be accepted, more information should be provided regarding the results of your office's inquiry into the details of EEOC's investigation of the complainant's grievance.

The complainant's second grievance alleges that CSU has failed to recruit, hire, promote, and give tenure to Hispanic faculty and staff, on account of their national origin. Your memorandum indicates that these allegations were not investigated by EEOC; however, you recommend that this aspect of Mr. Hernandez-Nieto's complaint not be the subject of "a complete investigation" at this time because of your office's "impression from unofficial documents and from the CSU catalogs that CSU probably has a better than average record of employing Hispanic faculty and administrators at all levels," suggesting to your office that the "pattern or practice" of discrimination alleged by the complainant is unlikely to be found substantiated by OCR.

Especially in light of the complainant's allegation that CSU has failed to *promote* Hispanic faculty, it is difficult to see how the sources of information cited by your office would indicate *per se* whether or not the complainant's class-based allegations have possible *merit*. The fact that CSU currently employs Hispanic faculty and administrators "at all levels," for example, does not necessarily reduce the possibility that any of the complainant's class-based promotion allegations are true. Unless a more persuasive justification can be submitted for narrowing the investigation of this aspect of the complainant's grievances, the complainant's allegations in this regard should be investigated in full, *after your office has provided an analysis confirming that OCR has jurisdiction over the relevant component(s) of CSU's operations in light of Grove City*.

The complainant's final set of grievances appears to be identical to the set of class-based grievances alleged by complainant Maria Arcay in "Arcay I," discussed above. With regard to the jurisdictional issues relevant to this set of grievances, this memorandum's comments regarding the relevant portion of "Arcay I" are equally applicable. Your recommendation regarding the consolidation of Mr. Hernandez-Nieto's complaint with "Arcay I," however, should be re-evaluated in light of this memorandum's comments regarding your recommended disposition of the first two portions of Mr. Hernandez-Nieto's complaint.

TAB J

In a document entitled "Summary of Enforcement Activities for the period March 5 - March 9, 1984, No. 09-79-5068, Phoenix Union High School District, Phoenix, Arizona," OCR staff addressed the inadequacy of the Castro court order in resolving the substantive Title VI violation that OCR had found. Specifically, that document stated:

> "OCR clearly recognizes that the steps taken by the District in response to the Castro order go a substantial distance in diminishing the segregative and discriminatory effects of its prior policies and decisions. These steps deserve considerable commendation. However, the scope of the school closure litigation was narrower than the scope of the student assignment investigation required under Title VI which examined the issue of racial isolation in all the District's schools. The Castro litigation sought to remediate the elimination of comprehensive educational opportunities within the area served by the schools affected by the closure decisions, namely the areas served by East, North, Union and West High Schools. The court did not directly address the issue of racial isolation in other portions of the District, and the focus of the court's findings and order was the services provided to minority students in the central city area affected by school closures. The results of OCR's investigation reveal that two of the District's schools, South Mountain High School and Carl Hayden High School, continue to contain extremely disproportionate numbers of minority students. Despite the broad steps taken by the District since 1983, the racial isolation of these schools has not significantly altered."

If the comments described above were viewed in isolation, it would appear that the Castro order would be an inappropriate remedy for the violations OCR found. However, the circumstances surrounding the settlement, about which the staff responsible for handling this case were fully familiar, dictate a different understanding.

During the course of the administrative enforcement action, the Phoenix Union High School District submitted a compliance plan to OCR that fully addressed the substantive OCR violation. By memorandum dated October 5, 1984, the then Director for Policy and Enforcement Service of OCR, Antonio Califa, recommended that the plan be accepted and that the plan be incorporated with the Castro Order. (See attached.) The impetus for incorporation came from Phoenix Union. The district had expressed concern that some of its student assignment policies were governed by the Castro Order and that failure to incorporate might result in the district's being subject to two enforcement agencies, DOJ and OCR, with the possibility of conflicting goals. The decision to refer the case to DOJ for incorporation of the plan resulted from the recommendations of the Policy and Enforcement Service contained in the October 5 memorandum referenced above and in other exchanges on the subject over a period of several months. The incorporation resulted in no diminution in remedial action since all of the substantive provisions of the plan proposed by OCR staff were incorporated.

Attachment

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

DATE: OCT 5 1984

TO : Harry M. Singleton
Assistant Secretary
for Civil Rights

FROM : Antonia J. Califa
Director for Policy and
Enforcement Service

SUBJECT: Proposed Settlement of In the Matter of Phoenix Union High School District No. 210 (Docket No. 84-VI-15)

On March 10, 1984, OCR filed a Notice of Opportunity for Hearing against Phoenix Union High School District No. 210, Phoenix, Arizona, charging that their student assignment policies violated Title VI. Since that date, attorneys from Region IX and headquarters attorneys responsible for litigating the case have been negotiating a compliance agreement with counsel for the school district. These negotiations have been successful and Respondents are submitting the proposal, attached at Tab B (hereinafter referred to as "the Plan"), for your acceptance and settlement of the case. Both regional and PES attorneys responsible for the case have scrutinized the particulars of the Plan and recommend its acceptance as sufficient grounds to dismiss the enforcement action pending against Respondents.

The action was brought against Respondents for their violation of 34 C.F.R. § 100.3 for subjecting black and Hispanic students to discrimination on the basis of race in their student assignment policies and practices. The particular difficulty faced in reaching an agreement with Respondent school district was that some of its student assignment policies are presently governed by order of the U.S. District Court for the District of Arizona in Castro v. High School District # 210, CIV 82-302 (March 4, 1982) (hereinafter referred to as the Castro Order). OCR has no quarrel with the Order's provisions. Its relevance to OCR's efforts is the school district's insistence that it cannot enter into a compliance plan with OCR, without the Plan providing for the incorporation of OCR's plan into the Castro Order. The district is somewhat concerned that failure to incorporate may subject it to two separate enforcement agencies with conflicting goals. However, the real basis for its unwillingness on this issue is that the Arizona legislature will not provide the district with the additional funds it needs to implement aspects of the Plan unless the district can show that its additional needs are a result of court action. 1/

1/ The Arizona law provides, in relevant part: "For fiscal years 1983-1984 and 1984-1985, expenses of complying with a court order of desegregation may be exempt wholly or in part from the revenue control limit . . . ." Chapter 267 of House Bill 2018 of the Arizona State Legislature, issued by the Arizona Secretary of State March 7, 1984. See also pages 4 and 5 of the Introduction to the Plan.

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Usually, OCR does not favor incorporation of compliance plans into existing court orders. This is largely because of the administrative inconvenience of asking a court to rule on a breach of the compliance plan. PES recommends here making an exception to this approach on three grounds. First, the Plan stipulates that the evidentiary burden upon the Department will be light: "In any judicial proceeding initiated by the Department of Education pursuant to the provisions of this plan, a finding by the court of a material failure to comply with the requirements of the plan shall, without more, constitute a violation of Title VI." Plan at page 19, Subsection D. Second, the Arizona State law regarding budgetary practices provides a legitimate basis for considering this Plan an exception to, rather than a change in, OCR's position opposing incorporation. Third, a purely practical consideration, the district has made it absolutely clear that it will not agree to any settlement terms without inclusion of an incorporation provision. While the district has accepted OCR's counteroffers on a number of substantive provisions in the Plan, it has consistently rejected any attempts to remove the incorporation language. It is the opinion of OCR legal staff that the district would challenge OCR's jurisdiction in Federal court, and seek incorporation of the Plan and the Castro Order by that means, rather than settle with OCR without an incorporation provision in the Plan. Thus, the result appears to be the same for OCR. Either OCR agrees to go to court if something goes wrong with the Plan at some future date, or it will be taken to court now. Since the parties are in agreement as to the substance of the Plan, PES cannot recommend that OCR not accept the Plan on the basis of agency practice and administrative convenience. The incorporation provision is found on page 15 of the Plan at Section III A - C. The district has agreed to begin implementing the Plan during the pendency of its incorporation.

The central feature of the Plan is the immediate establishment of a computer magnet at one of the two most disproportionately minority schools, Carl Hayden High School. This program is described at pages 3 - 5, beginning at Subsection F. The Respondent has also committed to establishing, in the 1985-1986 school year, a performing arts magnet and closed-circuit television studio program at the other of the two most isolated schools, South Mountain High School. The Respondent has also agreed, in Subsection B of page 2, to consider the improvement of racial and ethnic balance and equal educational opportunity in acting upon any matter affecting student assignment. Where the district's assessment predicts an adverse impact, no action will be taken without OCR having an opportunity to consult with the district and negotiate alternatives. At pages 3 and 7, the Plan provides for incentives for the transfer of students to the predominately minority schools and protection against inter-district transfers. For example, a unique aspect of the Plan is that the district's minimum enrollment requirements for class offerings are waived at minority schools so that a wider array of classes will be available, and students will be allowed to enroll in a greater number of classes.

The Plan includes the necessary monitoring provisions to ensure that the Respondent performs as promised in the attached document. See the Plan at page 17, Section V. The district has established dates upon which it will report its progress to OCR. In 1988, OCR is scheduled to evaluate the results of the Plan to determine if it has achieved its purpose or if other actions need to be taken.

Should you concur with PES' recommendation that the Plan be accepted in settlement of the enforcement action against the Phoenix Union High school district, a memorandum to that effect, authorizing Region IX to enter into the agreement, is attached at Tab A. The court has granted the parties an extension of time to negotiate until October 22, 1984. The school district has asked that OCR make its decision by that date, if at all possible.

Attachments

Tab A - Memorandum to Robert L. Brown
Tab B - Proposed Compliance Plan

Offset: Supply
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